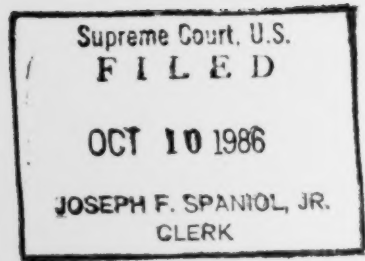


86 - 784



IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

No. _____

Silas V. Cross, Millie Cross,
Silas A. Cross, and Francine Cross,
Petitioners,

v.

United States of America
and the
Commissioner of Internal Revenue,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

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353 PP

**IN THE SUPREME COURT OF THE UNITED STATES
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**Unites States of America
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Commissioner of Internal Revenue,
Respondents**

**PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit**

QUESTIONS PRESENTED

1. Whether Silas V. Cross and Silas A. Cross, both Puyallup tribal members and Medicine Creek Treaty of 1854 Indians living in Tribal relations, as such are expressly forbidden statutory grant of U.S. Citizenship by the 14th Amendment, Sections 1 and 2 thereof of the United States Constitution.

2. Whether the U.S. Court of Appeals, Ninth Circuit, decision herein is in direct conflict with decisions of another U.S. Court of Appeals (Tenth Circuit) on the same matter involving the issues of whether general revenue Acts of Congress apply to treaty Indians, and whether non-competent restricted treaty Indians are ordinary citizens concerning affairs conducted on their allotted lands?

3. Whether Article 6 of the Medicine Creek Treaty of 1854, which incorporated the 6th Article of the Treaty with the Omahas, embodies

*For names of co-parties before Court of Appeals see case caption in Court's Opinion herewith.
Appendix F p. AA-1.

tax exemptions for its Indian allottees?

4. Whether the decisions of the U.S. Court of Appeals, 9th Circuit, has dieregarded an express solemn U.S. guarantee [9 Stat. 323, Oregon Territory Act, 1848] not to tax Medicine Creek Treaty peoples?

5. Whether the U.S. Court of Appeals for the Ninth Circuit has decided incorrectly an important question of Federal Indian law first presented by *Squire v. Capoeman*.

This issue is whether a principle, or rule, or dictum in *Squire v. Capoeman*, 351 U.S. 1 (1956) was so narrowly construed and technically misapplied by the Court of Appeals (Ninth Circuit) as to render the holding one which may grossly discriminate among treaty Indian allottees, and not a sound holding in conformance with law and reason?

6. Whether the decision of the Court of Appeals over-reaches and clouds the import of the facts to which the parties by stipulation were bound, so as to render the decision of the Court unsupportable on the facts stipulated? [*JUDICIS EST JUDICARE SECUNDUM ALLEGATA ET PROBATA* (Dyer, 12)]

REFERENCES TO THE RECORD

Arrangments pursuant to S. Ct. Rule 19 have been made with the Clerk of the Ninth Circuit Court of Appeals to forward the entire original record to the Supreme Court.

References to the record are abbreviated:

Transcripts (record of pleadings, motions, orders, etc., filed with Tax Court) (R, Tr,)

OPINIONS BELOW

The memorandum opinion of the U.S. Tax Court is reproduced in Appendix F, *infra* pp. AA-48 and reported in 83 T.C. 561 (1985).

The opinion of the Ninth Circuit Court of Appeals is reproduced in Appredix F hereto, *infra*, p. AA-1 and is reported in 792 F.2d 849 (9th Cir. 1986). The mandate by the Ninth Circuit Courts of Appeals to the U.S. Tax Court is reproduced in Appendix I hereto, *infra*, pp. AA-127.

JURISDICTION

The date of the judgment sought to be reviewed is June 19, 1986. The time of its entry was June 19, 1986.

There was a Petition for Rehearing timely filed on July 7th, 1986 which was denied by Order entered on the 22nd day of July, 1986.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

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THE CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

United States Constitution

Article 1 section 2 clause 3

Article 1 section 8 (Commerce Clause)

Article 2 section 2

Article 5

Amendment 14

Amendment 16

The treaty involved is known as the "Treaty of Medicine Creek." It is published in 10 Stat. p. 1132 and is set forth in Appendix A, *infra* pp. A-1 — A-10 with Article 6 Treaty with the Omaha 1854, pp. A-17—A-19.

The Statutes Involved are:

1 Stat. 50 (Northwest Ordinance of August 14, 1848) Appendix A, *infra* p. A-10.

9 Stat. 323 (Oregon Territory Act of August 14, 1848) Appendix A, *infra* p. A-10.

14 Stat. 27 (Civil Rights Act of April 9, 5 1866) Appendix A, *infra* p. A-11.

16 Stat. 577 (Appropriation Act of March 3, 1871) Appendix A, *infra* p. A-11.

24 Stat. 388, Secs. 5 & 6 25 U.S.C. 331 et seq. (General Allotments Act of February 8, 1887) Appendix A, *infra* p. A-12.

25 U.S.C. 349 (General Allotment Act 1887, Section 6 Amended). Appendix A, *infra* pp. A-12, 13.

33 Stat. 565 (Removal of Allotted land restrictions Act of April 28, 1904) Appendix A, *infra* p. A-13

43 Stat. 253, 8 U.S.C. 3 (Indian Citizenship Act of June 2, 1924) Appendix A, *infra* pp. A-13, 14.

48 Stat. 934, 25 U.S.C. 465 (Indian Reorganization Act of 1934) Appendix A, *infra* p. A-14.

8 U.S.C. 1401(a)(2) (Nationality Act of 1940) Appendix A, *infra* pp. A-15 & 16.

4 U.S.C. 105, 106 and 109 (Buck Act of July 30, 1947) Appendix A, *infra* p. A-15.

26 U.S.C. Section 1 and 61 Appendix A, *infra* p. A-16. 26 U.S.C. Section 894 Appendix A, *infra* pp. A-16, 17.

26 U.S.C. Section 7852, Appendix A, *infra* p. A-17.

25 U.S.C. 2210 (Act amending section 5 of the Indian Reorganization Act—25 U.S.C. 465, passed 1983) Appendix A, *infra* p. A-17.

STATEMENT OF CASE

1. Pleading and Prior Proceedings.

The case began by Petition in the U.S. Tax Court (trial Court) to review Internal Revenue Service assessment on proceeds from sales of Tobacco products (cigarettes, etc.) and other items. (R, Tr 1). All sales took place at the trading post or store on original allotted land in direct familial possession since the 1870's within boundaries of the Puyallup Indian reservation (A Medicine Creek Treaty of 1854 Indian Tribe). The factual basis for this case was admitted to by formal stipulation, accompanied with exhibits (R, Tr 30). The U.S. Tax Court, as did the Court of Appeals, upheld the respective assessment for tax years involved. Their holdings were founded upon a finding of U.S. Citizen status in Petitioners, and upon a ruling that general revenue laws applied to Indian trading activity without respect for the claim that treaty rights were superior and exclusive. Both Courts refused Petitioners claim of tax exemption under *Squire v. Capoeman*, 351 U.S. 1, 76. S. Ct. 611, 100 L.Ed. 883 (1956), which application of that case, petitioners argue, is without merit.

Petitioner timely filed a petition for rehearing citing both matters of essential fact and law, which were disregarded by the Court in its decision. Petition for Rehearing (Appendix F, *infra* p. A-139) was denied.

2. Essential Facts

A. Petitioners Silas V. Cross and Silas A. Cross, father and son, are, by stipulated and settled fact, duly enrolled Puyallup Indians, who live in tribal relations within the boundaries of the Puyallup Indian Reservation. Silas V. Cross resides upon land originally assigned and allotted in the 1870's to his grandfather. In the 1970's by Sec. 5 of the *Indian Reorg. Act* the trust status of Silas V. Cross was confirmed and he is the beneficial owner of the land, as was his Grandfather before him who was the beneficial owner of the same land. On this original allotted land the trading post of the Cross' is operated. Numerous kinds of articles are traded or sold thereat, which are traditional treaty Puyallup Indian trade items, and they include tobacco products imported as was done historically (pre and post Medicine Creek Treaty of 1854) from the Eastern part of the United States. For full copy of said stipulation to

Affidavit of Silas V. Cross (Kwul-wout) see Appendix C, pp. A-73. For full copy of Affidavit of Barbara Lane, Ph.D., Anthropologist, who writes of early Puyallup Indian tribal tobacco trade see Appendix D, pp. A-100. (Note Dr. Barbara Lane's: Report in Affidavit form is incorporated by reference in Affidavit of Silas V. Cross at page 3 thereof; also it was made part of the U.S. Tax Court record as Specimen "B" attached to "Memorandum of Authorities." (R, Tr 31).

B. It is the established (stipulated to) fact of this case that both Silas V. Cross and Silas A. Cross are not citizens of the United States, and never have sought or consented to citizenship. They declare they have never been subject, during their lifetimes, to the complete jurisdiction of the United States of America. Silas V. Cross and Silas A. Cross are both loyal Puyallup Indian tribal members and Puyallup tribal citizens, which status will admit of no dual citizenship under either tribal or U.S. law. The Internal Revenue Service contends that Petitioners are U.S. Citizens under terms of the 1924 Indian Citizenship Act, as amended (43 Stat 253 and 8 U.S.C. 1401 (a) (2)).

C. Petitioners are subject to the internal sovereignty of their tribal nation at all times pertinent in this case. Furthermore, because of internal tribal sovereignty, Petitioners are subject to and regularly pay tribal taxes on their reservation (allotted) land trading activities. Silas V. Cross and Silas A. Cross are both noncompetent restricted Indians. Silas V. Cross is currently beneficial owner of the allotment on which trade is conducted.

D. Petitioners use and exploit their original allotted trust land interest for economic sustenance and advantage as did their predecessors in interest on a tax free basis. For the first time in Medicine Creek Treaty history in the 1970's the Internal Revenue Service made assessments upon proceeds derived from trading. It is a fact that Petitioners conduct no mining, farming, ranching, or grazing activity on their allotted land. Petitioner's land does not lend itself to any use but its historical use, from time immemorial, of trading, storage and maintenance of fishing gear. It was tidal swamp land with portions under water six months or more each year. The closest solid soil was three miles east of Petitioner's trading post on original allotted land.

E. It is the established fact of this case that the intentions of both the U.S. Government (Congress) and the Puyallup Tribal Government were that Puyallup tribal members were to be forever free of U.S. and State

taxes while living and working on their reservation. (Appendix C pp. A-89, 96).

REASONS FOR GRANTING THIS WRIT

1. The decision of the Court of Appeals in the instant case rests solely upon the curious dictum of *Squire v. Capoeman*, *supra*, which denies other pointed decisions regarding the 14th Amendment Sec. (1) citizenship status as found in *Afroyim v. Rusk*, 387 U.S. 253 (1967), and *Rogers v. Bellei*, 481 U.S. 815 (1971), *Elk v. Wilkens*, 112 U.S. 94 (1884). Footnote 1 of U.S. Court of Appeals Opinion [Appendix F, p. A-125] stated and held controlling:

“... The Supreme Court has decided that ‘Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.’ *Squire v. Capoeman*, 351 U.S. 1, 6 (1956).”

With this dictum in hand which concerns the General Allotment Act of 1887, the Court of Appeals readily applies Section 1 and 61 of the Internal Revenue Code (Title 26 U.S.C.), itself predicated upon U.S. Citizen, U.S. residence or non alien status. Cf. informal letter of July 16, 1986 of District Counsel for I.R.S. (in Appendix E, pp. A-119, 120) which (in part) reveals I.R.S. reasoning:

“Section 1 of the Internal Revenue Code (I.R.C. 26 U.S.C.) imposes an income tax upon *every individual* who is a citizen of the United States; a resident of the United States; and, to the extent provided in I.R.C. Sections 871 (b) and 877 (b), a nonresident alien. Treas. Reqs. Section 1.1-1 (a). (Emphasis added)

The Ninth Circuit Court of Appeals Opinion depends on the assumption that Petitioners are U.S. citizens. Were they not such, 26 U.S.C. Secs. 1 and 61 could not apply. Cf. *O'Malley v. Woodrough*, 307, U.S. 277, 282 (1939) and its similar reasoning which held that Article III judges, because they were ordinary citizens, were therefore subject to income taxation. Cf. Appendix E pp. A-109-110. Petitioners born into tribal relations from time immemorial have never acknowledged loyalty or allegiance to any community of peoples save the Puyallup Indian nation itself. (Cf. excerpts from “Opening” and “Reply” briefs on citizenship status issue Cf. Appendix E, pp. A-112-117). *Elk v. Wilkens*, *supra*, declared John Elk, an Indian person who severed his tribal relations and adopted the habits of civilized men, to be a non U.S. Citizen

because in 1884 no valid Act of Congress existed declaring him to be a U.S. citizen. Even when *Elk* subjected himself to the complete jurisdiction of the United States by all necessary acts, it yet remained for Congress to accept John Elk's consent and submission. Nor did the General Allotment Act 1887, Section 5, thereof, (Appendix A, p. A-12) make John Elk a citizen because he was not an Indian land allottee. It remained for the passage of the Indian Citizenship Act of 1924, Appendix A, p. A-13, for John Elk to become a U.S. Citizen. (Cf. Dept. of Interior letter May 6, 1873 Appendix G, p. A-173). It is suggested that the full use of the 1924 Indian Citizenship Act is to enfranchise former treaty Indians, who by their own actions, have severed their tribal relations. If one considers the General Allotment Act of 1887, or the *Indian Citizenship Act* of 1924, to be Acts which by themselves confer citizenship status upon a person without the need of a concomitant act of consent by the person upon whom such a status is bestowed, then, it is argued, such a bestowal defeats the 14th Amendment, Section (1) and (2), and the prohibition therein against such a bestowal upon one of the Petitioner's status who is a member of a Treaty Indian Nation. Petitioners are direct descendants in interest of an ancient independent people sufficiently homogeneous and numerous for the U.S. to have deemed it essential to make a treaty of land cession with them. The Puyallup Indian tribe has ceded exceedingly valuable lands (2,000,000 acres) voluntarily to the United States in exchange for freedom from taxes among other guarantees. The Puyallup Nation has never been subjected by the U.S. to conquest, nor have they voluntarily ceded to the U.S. their reserved areas, nationality, customs or essential sovereignty. The Puyallups are and remain a sovereign nation.

The great question of U.S. Citizenship was decided with simplicity in the 14th Amendment, Sections 1 and 2 thereof:

"Section 1. All persons born or naturalized in the United States *and subject to the jurisdiction* thereof, are citizens of the United States and of the State wherein they reside . . ." (Emphasis added).

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed.*" (Emphasis added).

In *Afroyim v. Rusk*, *supra*; (at pages 262 and 263), the Court said of

Sec. 1 of the 14th Amendment (Citizenship clause):

“ ‘It settles the great question of Citizenship and removes all doubt as to what persons are or are not Citizens of the United States . . . We desire to put this question of Citizenship and rights of citizens . . . under the *Civil Rights Bill beyond the legislative power . . .* ’ Cong. Globe, 39th Cong. 1st Sess. 2890, 14 2897 (1866).” (Emphasis added).

There can be no doubt about the independent and sovereign status of Treaty Indians. (Cf. text of 14th Amendment Congressional debate Cong. Globe 39th Cong. 1st. Sess. 2890, 2897 (1866) Appendix B. A-20—A-72.)

It was likewise authoritatively observed, in *Rogers v. Bellei*, *supra*, that:

“Mr. Justice Gray has observed that the sentence of the 14th Amendment was ‘declaratory of existing rights, and affirmative of existing law, so far as the qualifications of being born in the United States, *and being subject to its jurisdiction* are concerned’. *United States v. Wong Kim Ark*, 169 U.S. at 688, 42 L.Ed. at 905.” (Emphasis added).

Moreover, the 1866 speech of Senator Howard to the Senate is persuasive, page 2897 of 1866 Cong. Globe 1st Session:

Mr. Howard “I hope that amendment to the amendment will not be adopted. *Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations.*” (Emphasis added).

The 14th Amendment, Secs. (1) and (2) do not allow for dual citizenship. *Vance v. Terragas*, 444 U.S. 252 (1980). In this case the entire court followed the vitality of *Afroyim*, *supra*; Petitioners assert they owe the entirety of their allegiance to the Puyallup Indian Nation and have never been out of tribal relations, nor have they ever accepted or gained American Citizenship status (Affidavit of Silas V. Cross Appendix C, p. A-96). Petitioners live and conduct tribally sanctioned and tribally taxed trading activities within the boundaries of their nation, (reservation). The Bill of Rights of the U.S. Constitution does not apply nor appertain to them within these boundaries. Cf. *Talton v. Mayes*,

163 U.S. 376, 16 S. Ct. 86, 41 L.Ed. 196 in which the Court held that the 5th Amendment did not apply to local legislation by the Cherokee Nation no matter how onerous such legislation may be. In *Native American Church of America v. Navajo Tribal Counsel*, 272 F.2d 731 (10th Cir. 1959) a tribal law impacted severely upon the practice of religion, but the Court held: (At page 134-135)

"The First Amendment applies only to Congress . . . It is made applicable to the States only by the Fourteenth Amendment . . . [A]s declared in the decisions . . . Indian tribes are not states. They have a status higher than that of states The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by some treaty or some Act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian Nations nor is there any law of Congress doing so . . ."

In *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1978) the Plaintiffs were not upheld when urging (at page 681)

" . . . that the due process clause of the Fifth Amendment and the equal protection and due process clauses, of the Fourteenth Amendment and the provisions of the Fifteenth Amendment by the passage of 25 U.S.C. Sec. 1302 (b) of the Indian Bill of Rights have been made applicable to the Cherokee Tribe."

The Court held: (*ibid*)

"The provisions of the Constitution of the United States have no application to Indian nations or their governments, except as they are expressly made so by the Constitution (the Commerce Clause) or are made applicable by an Act of Congress.

We think the legislative history or the so-called Indian Bill of Rights refutes the contention of Plaintiffs stated above."

By denying one the benefits of the Bill of Rights is effectively to deny one the status of citizenship. [Note: If Petitioners are to be U.S. Citizens by the Constitution of the U.S., all previous decisions denying application of U.S. Bill of Rights to them must be overruled.] 2. The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the Circuit of Appeals for the Tenth Circuit. In *U.S. v. Daney*, 370 F.2d 791 (10th Cir. 1966) the Court refused to act as a super legislator and

held that ordinary tax rules did not apply to Daney, who was in a position similar to Petitioner Silas V. Cross: "a noncompetent restricted . . . Indian" (p. 795). The government had contended (page 795):

" . . . [T]he lease bonus must be taxable income since: 'The ordinary citizen pays income taxes at ordinary rates on a lease bonus because such bonus has been held under long standing Supreme Court decisions to be in the nature of a advance royalty payment to the lessor' .

This misses the mark. We are not dealing with an ordinary citizen. We are dealing with a non-competent restricted Choctaw Indian who in 1958, was living on his allotted restricted land. This Indian's lease bonus is taxable if and only if the Act of 1928 [Special Act of Congress of May 10, 1908] says it is.' (Emphasis added)

Further, *Daney* gave this ultimate rationale for its decision: (At page 795)

"It may be said that there no longer exists any need to give the restricted Indian a tax advantage, that he has become an independent, qualified member of the modern body politic and indeed, that all the 'ordinary' tax principles should be applicable to him. *It is for Congress to make that determination and change the Act of May 10, 1928. This Court cannot.*" (Emphasis added)

Squire v. Capoeman, (*supra*) with its rationale, was prior to *Daney* and was prominently cited therein at pages 793 and 795. The *Daney* Court, however, does not treat *Daney* as a citizen acting "in ordinary affairs of life, not governed by treaties or remedial legislation." *Daney* is settled law for the 10th Circuit, affirming the *Daney* trial court, 247 F. Supp 533, 536 (1965) which held:

"The Internal Revenue Codes of 1926, 1928, 1932, 1934, 1939, and 1954, made no specific reference to income taxation of *non-competent Indians*. . . . We therefore must conclude that special '*Indian tax statues*' must be passed by Congress in order to impose tax liability on Indian income."

The non-citizenship issue was not before the *Daney* Trial Court; however, that Court astutely observed (a position antipodal to the Ninth Circuit Court): (At page 536)

"Bluntly, if the 'general rules' apply to *Daney* he would be required to pay the tax to support the Government which protects him, *but general Acts of Congress do not apply to Indians unless*

so expressed as to clearly manifest an intent to include them.”
(Emphasis added)

Within the Tenth Circuit, noncompetent restricted Indian status requires application of special rules, whereas in the Ninth Circuit such, apparently, is not the case. The Ninth Circuit Court of Appeals decision in this case, it may be observed, is in direct conflict with the application of esteemed principles of Indian tax law observed by the Tenth Circuit Court of Appeals in *Daney*, and in *Blackbird v. Commissioner*, 38 F.2d 976 (10th Cir. 1930). *Daney*, holds at page 536:

“[T]ax exemptions are found by implication in Indian tax cases, e.g. *United States v. Hoffman*, 306 F.2d 493 (10th Cir. 1962) (Per Curiam); *United States v. Hoffman*, 306 F.2d 620 (10th Cir. 1962)”.

The leading case of *Choate v. Trapp*, 224 U.S. 655, 675, 32 S. Ct. 565, 569, 56 L.Ed. 941 (1921) requires all Indian statutes to be liberally construed, holding:

“... This rule of Construction has been recognized without exception for more than a hundred years, and has been applied in tax cases.”..

This is firmly part of the state of Indian law in the Tenth Circuit but not in the Ninth Circuit. It is the contention of the Petitioners that they, as noncompetent restricted Indians, would have obtained a decision from the 10th Circuit favorable to their cause had they lived and traded on a Treaty reservation situated in the 10th Circuit. For clear illustration of this difference consider (*infra*) language in *Daney v. U.S.* at page 538:

“If *Daney* were a competent *Choctaw* with *unrestricted* land, the income would in our opinion, be taxable since the case would then become in the nature of an ‘ordinary tax case’.” (Emphasize added)

In fact, the state of Indian tax law in the Tenth circuit is to rely on *Squire v. Capoeman*, directly for the proposition that:

“The tax cases involving restricted, non-competent Indians are not to be analyzed as ‘ordinary tax cases’ (See *Daney v. U.S.*, *supra*, page 536)”.

However, the Ninth Circuit reads the meaning of *Squire v. Capoeman* contrary to the understanding of that case by the Tenth Circuit.

3. Petitioners contend the Ninth Circuit fails to recognize a claim for tax exemption based on Article 6 of the Medicine Creek Treaty of

1854, which incorporates herein by reference, the 6th Article of the Treaty with the Omahas in 1854. (Appendix A. pp. A-17-19). Petitioners refer to language from this 6th Article of the Treaty with the Omahas (a consideration never yet construed by any Circuit Court, or by the U.S. Supreme Court) which provides the ground for exemption from Federal taxation to any within the status of Indian allottees.

“ . . . [T]he tract shall not be aliened or leased for a longer term than two years *and shall be exempt from levy, sale, or forfeiture*, which conditions shall continue in force until . . . the legislature of the State shall remove the restrictions . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress.”

Land exempt from “levy,” “sale” or “forfeiture” is exempt from Federal taxation so long as the land is restricted. Section 5 of the Indian Reorganization Act of 1934, amended by 25 U.S.C. 2210 in 1983 provides: “All land acquired by the United States for an Indian under authority of this Chapter [Sec. 5] shall be exempt from Federal . . . taxation.” Congress has consented to removal of restriction only *upon alienation* in the case of Puyallup Indians (33 Stat. 565. April 28, 1904). In *Cook v. United States*, 288 U.S. 102, 121, 122 (1933), the high Court illustrates that without the power to seize there is no power to tax:

“Our government *lacking power to seize*, lacked power because of the treaty to *subject the vessel to our laws*. To hold that adjudication may follow a wrongful seizure would go far to nullify, the purpose and effect of the treaty.”

No part of the Internal Revenue Code can be part of the Treaty in any event. The *Diamond Rings v. U.S.A.*, 183 U.S. 176, 183 (1901):

“*Obviously, the treaty must contain the whole contract between the parties . . .*”

Only the U.S. President can initiate action to amend any treaty. This has not been done. *U.S.A. v. Curtis-Wright Export*, 299 U.S. 304, 319 (1936):

“ . . . He made treaties . . . to the field of negotiation the Senate cannot intrude . . . ”

Even if a treaty obligation to pay income taxes could be found 26 U.S.C. 894 and 26 U.S.C. 7852 exempts these.

The Ninth Circuit ignored the spirit of *Choate v. Trapp, supra*. The

Choate decision at page 675, shows how all Indian statutes are to be liberally construed:

"The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its *protection and good faith*. This rule of construction has been recognized, without exception for more than a hundred years and has been applied in Tax Cases."

4. A United States Statute (9 Stat. 323, Aug. 1848) creating government authority over the Oregon Territory confirmed the U.S. position respecting rights of Indians residing therein. The U.S. government later negotiated and ratified the Medicine Creek Treaty of 1854 which could only have been ratified under the terms of said Act which guarantees absolute freedom from U.S. taxation and related confiscations of property belonging to Oregon Territory Indians. In *United States ex rel Certain Tribes v. State of Washington*, 394 F. Supp. 312 (1974), Affirmed F.2d (9th Cir. 19), at pages 353 and 354 Judge Boldt said:

"By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said Act shall be construed to *impair the rights of persons or property now pertaining to the Indians in said territory, so long as such right shall remain unextinguished by treaty, between the United States and such Indians* . . . Section 14 of that Act extended to the Oregon Territory the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which provides that '*good faith shall always be observed toward the Indians; their lands and property shall never be taken without their consent*.''" (Emphasis added)

The Court of Appeals commits grievous error when it fails to follow the principle of its own body of Federal law, which declares that statutes, *in pari materia*, are to be construed together (as in *Stevens v. C.I.R.*, *infra*). Adhering to the principle of *in pari materia*, the Court should have construed that freedom from Federal taxation derives from 9 Stat. 323 (Oregon Territory Act of 1848) construed together with 10 Stat. 1132 (Medicine Creek Treaty of 1854), resulting in the necessary conclusion that a vested right of freedom from U.S. Taxes was not extinguished by treaty.

5. Petitioner is also entitled to tax exemption based on Section 5 and

6 of the General Allotment Act. *Stevens v. C.I.R.*, 452 F.2d 741 (9th Cir. 1971). In *Squire v. Capoeman*, *supra*, certiorari was granted the Government upon the basis that the Court of Appeals for the Ninth Circuit, in upholding Horace Capoeman's (Indian allottee) claim of tax exemption, was at variance with the decision then regarded as controlling in the Tenth Judicial Circuit in the decision of *Jones v. Taunah*, 186 F.2d 445 (10th Circuit 1951). Petitioners contend that the valid general rule of *Squire v. Capoeman*, *supra*, as opposed to some specific application of it, is set out verbatim at page 8 thereof:

"The literal language of the provision [Section 6] evinces a congressional intent to subject an Indian Allotment to all taxes only after a patent in fee is issued to the allottee. This in turn implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted."

No patent *in fee* has yet been issued on this original allotted land (even though a preliminary or trust patent was issued in 1886). The general rule does not distinguish or discriminate in how Indian allotments are, or may be, used, (e.g. fishing, farming, trading and mining, etc.). The result in *Capoeman* is but a *specific* application of this *general* rule. This rule, as applied, by the Ninth Circuit, is a judicial invention. A specific application of the rule should not be thought to be the controlling category for all and future uses. Too, a particular application should not be seen to control general and different applications of the rule. The Ninth Circuit ignored the force of *Stevens v. C.I.R.*, *supra*, and its application to Petitioners' case. *Stevens* at page 745, held:

"This construction (i.e. that the benefits and restriction of the General Allotment Act apply to all Indian allotments) is, of course, in accord with long standing Congressional policy of treating Indians *equally*. . . ." (Emphasis added)

Petitioner argues that it had never been the intent of Congress to discriminate against the class of allottees by imposing upon them discriminatory practices which would arbitrarily dictate how one allottee could use an allotment to his benefit, whilst another allottee would be forced to use his allotment to his detriment. The *Cross* decision, however, promotes such a discriminatory practice. Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Bolling v. Sharpe*, 347 U.S. 497, 499, and 500 (1954). May it be further noted that a "directly derived" test unneces-

sarily burdens how land can be effectively used. As long ago as 1926 in a letter cited by the U.S.S.Ct. in 1983 [Footnote 15], the B.I.A. Commissioner saw the need to leave Indian land allotments unencumbered from unnecessary restraints upon their use and commercial development. *Nevada v. U.S.A.*, 436 U.S. 110, 135 (1983), Footnote 15.

Tax impositions are an example of such incumbrances, as are arbitrary or partial tax; exemptions which flow from a "directly derived" test for some uses of Indian allotments.

6. The government had stipulated to all material facts in this case, making a trial on them unnecessary. Petitioners now complain that many material facts of record were ignored by the Court of Appeals in reaching its decision. All facts of this case are found in Appendix C, pp. A-76-99. Those ignored are:

1. Silas V. Cross had never consented to any grant of U.S. Citizenship; nor had he ever been taken out of tribal relations, into which he was born even before the Indian Citizenship Act of 1924. (p. A-96)

2. That from 1855 to the early 1970's no Federal income tax collection process was directed against Petitioners and their tribal nation. (pp. A-86 & 91)

3. That oral traditions of the Puyallup tribe clearly indicate that it was the intention of the U.S. Treaty agent to save and guarantee the Puyallup tribe free from all U.S. taxes. This was also the view of Petitioners treaty ancestors. (pp. A-88 & 97)

4. That U.S. Interior Department book publication "Indians of the Northwest" by Ruth Underhill, Ph.D., incorporated tribal oral tradition and U.S. Agency history clearly established: (p. A-89)

"... Indians must choose some part of their territory where they would remain free of taxes. The rest of the country would be thrown open to settlement."

5. That Silas V. Cross, Petitioner, did personally know that his Great Grandfather, Grandfather, Father, and himself, as well as other Puyallups, traded extensively from 1855 to late 1970's without the U.S. Government ever asserting an income tax requirement upon their respective trading profits. (p. A-87)

6. "No fair construction of the Internal Revenue Code allows for any supposition that Congress ever intended to impose income taxes upon treaty Indians living in tribal relations, whose income was derived from exercising treaty protected and guaranteed rights, as well as from trust

land activities.” (p. A-88)

7. “No certificate of competency has ever heretofore issued to either me or any of my direct ancestors.” (p. A-91)

8. “Being in a condition of dependent or ward of the United States not in any way a constitutional member or citizen thereof, and being required to pay income taxes on income earned directly through my dependency status, is a form of servitude which is forbidden. Also, my right to a nationality is being directly assailed through the destructive power of taxation.” (p. A-95)

9. Oral traditions of the Puyallup tribe establish conclusively that, “At [Fox Island conference of 1857 concluding local war of 1855-56] it was understood by representatives of the U.S. [Gov. Issac Stevens-Treaty agent] and Puyallup tribal members that no taxation could or would ever be imposed upon the exercise of their reserved rights of fishing, trading, hunting and manufacturing, . . .” and other such rights. (p. A-97)

10. In 1866 a “Preliminary Patent was issued to Petitioner Silas V. Cross’ grandfather which was expressly referenced to the 6th Article of the treaty with the Omahas and is a direct application thereof.” “It was always my people’s understanding that we were guaranteed a permanent home free of taxes forever, so long as we occupied the permanent homeland involved.” (p. A-98)

Petitioners contend it to be manifestly unjust for the foregoing facts of the case to be ignored by the Court of Appeals and U.S. Tax Court when reaching their decision(s).

An historical background to the facts surrounding this case had been reached judicially in *United States ex rel Certain Tribe v. Washington*, 384 F. Supp. 312 (1974). See Appendix G. p. A-174.

CONCLUSION

The Writ of Certiorari should be granted to the Petitioners, based upon some, or all, of the reasons set forth in this Petition. The Petition presents legal questions of first impression arising under the Treaty of Medicine Creek. *Squire v. Capoeman* does not address the issue of citizenship and taxes, which this Petition raises. That same case does not settle the question whether federal income taxes may be imposed upon a member of an Indian tribe who has forever lived in tribal relations since 1855, when the Treaty of Medicine Creek was formed (and incorporating by reference the sixth article of the Treaty of the Omahas); nor

does that same decision reach to the nature of the treaty language of Medicine Creek, the intent of which was to hold certain Indian tribes free from the burden of federal taxation for all time. These two treaties, when read in conjunction with later enactments of Congress (4 U.S.C. 105-109, and 25 U.S.C. 2210) indicate that ordinary tax rules do not apply to noncompetent restricted Indian allottees, a benefit which has been denied to the Petitioner. Indian commerce, manufacture, industry, property were, because of treaty and United States guarantees embodied in Acts, Ordinances, and Statutes, understood by the treaty nations to be free in perpetuity from any burden and incident of federal taxation. Questions of such public importance and concern are fitting for this Court, for honor and for justice, to decide with finality.

Respectfully submitted,

PETER D. FRANCIS, Esq.,
Attorney for Petitioner

APPENDIX - A
TREATY AND STATUTES INVOLVED
MEDICINE CREEK TREATY
(10 Stat. 1132)

Franklin Pierce, President of the United States of America, to all singular to whom these presents shall come,

Greeting: -

Whereas a Treaty was made and concluded on the She-nah,nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to-wit: Articles of agreement and convention made and concluded on the She-nah-ham, or Medicine Creek in the Territory of Washington, this twenty-sixth day of December in the year one thousand eight hundred and fifty-four by Isaac I. Stephens, Governor and Superintendent of Indian affairs of the said Territory, and the undersigned chiefs, head-men, and delegates of

the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Steh-chas, T"Peeksin, Squi-aitl, and Sa-heh-wamish tribes, and bands of Indians occupying the lands lying around the head of Puget's Sound and the adjacent inlets who for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

Article 1. The said tribes and bands of Indians hereby cede, relinquish and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows, to-wit:

Commencing at a point on the Eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence Southerly along the summit of said Range, to a point opposite the

main source of the Skookum Chuck Creek; thence to and down said Creek, to the coal mine; thence Northwesterly to the summit of the Black Hills; thence Northerly through the portage known as Wilke's Portage, to Point Southworth, on the Western side of Admiralty Inlet; thence around the foot of Vashon's Island, Easterly and Southeasterly, to the place of beginning.

Article 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, via: The small Island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres on Puget's Sound near the mouth of the She-nah-ham Creek, one mile West of the Meridian line of the United States Land Survey and a square tract containing two Sections, or twelve hundred and eighty acres, lying on the

South side of Commencement Bay; which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the Superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of the citizens of the United States and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves and on the other hand, the right, of a way with free access from the same to the nearest public highway is secured to them.

Article 3. The right of taking fish, at all

usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands; Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses and shall keep up and confine the latter.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, two thousand dollars each year; for the next four years, fifteen hundred dollars each year; for the next five years, twelve hundred dollars each

year; for the next five years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time, to time, determine, at his discretion, upon what beneficial objects to expend the same. And the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians, in respect thereto.

Article 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and extended under the direction of the President, and in such manner as he shall approve.

Article 6. The President may hereafter,

when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assigns the same to such individuals or families, as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this

Treaty, shall be valued, under the direction of the President, and payment be made accordingly therefor.

Article 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Article 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved, before the agent the property taken shall be returned, or in default thereof, or if injured, or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribes except in self defense, but will submit all matters of difference between them and other Indians to the Government of the

United States, or its agents, for decision and abide thereby. And if any of the said Indians commit any other depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this Article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article 10. The United States further agree to establish at the general agency for the

district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructor's, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advise to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Article 11. The said tribes and bands agree

to free all slaves now held by them, and not to purchase or acquire others hereafter.

Article 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the Superintendent or agent.

Article 13. This Treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent Territory of Washington.

Qui-ee-metl,	his x mark. [L.S.]
Sno-ho-dumset,	his x mark. [L.S.]
Lesh-high,	his x mark. [L.S.]
Slip-o-elm,	his x mark. [L.S.]
Kwi-ats,	his x mark. [L.S.]
Stee-high,	his x mark. [L.S.]
Di-a-keh,	his x mark. [L.S.]
Hi-ten,	his x mark. [L.S.]
Squa-ta-hun,	his x mark. [L.S.]
Kahk-tse-min,	his x mark. [L.S.]
Sonan-o-yutl,	his x mark. [L.S.]
Kl-tehp,	his x mark. [L.S.]
Sahl-ko-min,	his x mark. [L.S.]
T'bet-ste-heh-bit,	his x mark. [L.S.]
Tcha-hoos-tan,	his x mark. [L.S.]
Ke-cha-hat,	his x mark. [L.S.]
Spee-peh	his x mark. [L.S.]
Swe-yah-tum,	his x mark. [L.S.]
Chah-achsh,	his x mark. [L.S.]
Pich-kehd,	his x mark. [L.S.]
S'klah-o-sum,	his x mark. [L.S.]
Sah-le-tatl,	his x mark. [L.S.]
See-lup	his x mark. [L.S.]
E-la-kah-ka,	his x mark. [L.S.]
Slug-yeh,	his x mark. [L.S.]
Hi-nuk	his x mark. [L.S.]
Ma-mo-nish,	his x mark. [L.S.]
Cheels,	his x mark. [L.S.]
Knutcanu,	his x mark. [L.S.]
Bats-ta-kobe,	his x mark. [L.S.]
Win-ne-ya,	his x mark. [L.S.]
Klo-out,	his x mark. [L.S.]
Se-uch-ka-nam	his x mark. [L.S.]
Ske-mah-han	his x mark. [L.S.]
Wuts-un-a-pum,	his x mark. [L.S.]
Quut-a-tadm,	his x mark. [L.S.]
Quut-a-heh-mtsn,	his x mark. [L.S.]
Yah-leh-chn,	his x mark. [L.S.]
To-lahl-kut,	his x mark. [L.S.]
Yul-lout	his x mark. [L.S.]
See-ahts-oot-soot,	his x mark. [L.S.]
Ye-tahko,	his x mark. [L.S.]

We-op-it-ee,	his x mark. [L.S.]
Kah-sld,	his x mark. [L.S.]
La'h-hom-kan	his x mark. [L.S.]
Pah-how-at-ish	his x mark. [L.S.]
Swe-yehm,	his x mark. [L.S.]
Sah-hwill,	his x mark. [L.S.]
Se-kwaht,	his x mark. [L.S.]
Kah-hum-kl't,	his x mark. [L.S.]
Yah-kwo-bah,	his x mark. [L.S.]
Wut-sah-le-wun,	his x mark. [L.S.]
Sah-ba-hat,	his x mark. [L.S.]
Tel-e-kish,	his x mark. [L.S.]
Swe-keh, nam,	his x mark. [L.S.]
Sit-oo-ah,	his x mark. [L.S.]
Ko-quel-a-cut,	his x mark. [L.S.]
Jack,	his x mark. [L.S.]
Keh-kise-be-lo,	his x mark. [L.S.]
Go-yeh-hn	his x mark. [L.S.]
Sah-putsh,	his x mark. [L.S.]
William,	his x mark. [L.S.]

Executed in the presence of us: -

M.T. Simmons, Indian Agent
 James Doty, Secretary of the Commission
 C.H. Mason, Secretary Washington Territory
 W.A. Slaughter, 1st Lieut. 4th Infantry
 James McAlister,
 E. Giddings, Jr.
 George Shazer,
 Henry D. Crock
 S.S. Ford, Jr.
 John W. McAlister,
 Clovington Cushman,
 Peter Anderson,
 Samuel Klady,
 W.H. Pullen,
 P.O. Hough,
 E.R. Tyerall,
 George Gibbs,
 Benj. F. Shaw, Interpreter,
 Hazard Stevens

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit: -

"In Executive Session, Senate of the United States, "March 3, 1855.

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Issac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup,

Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest:

ASBURY DICKINS, Secretary."

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L.S.] Done at the city of Washington, this
tenth day of April, in the year of our

Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:

W.L. Marcy, Secretary of State

FEDERAL STATUTES INVOLVED

1 Stat. 50. "Northwest Ordinance" of August 14, 1848.

Article III. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be

made, for preventing wrongs being done to them, and for preserving place and friendship with them. (Emphasis added)

9 Stat. 323. Oregon Territory Act of August 14, 1848.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the passage of this act, all that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon: Provided, That nothing in this act contained shall be construed to impair the right of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States

to make any regulation respecting such Indians,
their lands, property, or other right, by
treaty, law, or otherwise, which it would have
been competent to the government to make if this
act had never passed.

14 Stat. 27. Civil rights Act of April 9, 1866.

"All persons born in the United States, and not subject to any foreign power excluding Indians not taxed, are hereby declared to be citizens of the United States..."

16 Stat. 577. Appropriation Act of March 3, 1871.

"That hereafter no Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

24 Stat. 388, Secs. 5 & 6 25 U.S.C. 331 et seq.

General Allotments Act of February 8, 1887.

(Sec. 5)

". . . That at the expiration of said period the United States will convey the same by patent to said Indians, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever; provided, that the President of the United States may in any case in his discretion extend the period."

(Sec. 6.)

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, [and every Indian in Indian territory] is hereby declared to be a citizen of

the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

25 U.S.C. 349. General Allotment Act of 1887 Sec. 6 Amended.

"That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale incumbrance, or taxation of said and shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent..."

33 Stat. 565. Removal of Allotted Land

Restrictions Act of April 28, 1904

CHAP. 1816 - An Act Confirming the removal of restrictions upon alienation by the Puyallup Indians of the State of Washington of their allotted lands.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, that the Act of Congress approved March third, eighteen hundred and ninety-three (twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his

land.

APPROVED, April 28, 1904.

43 Stat. 253 Indian Citizenship Act of June 2,
1924.

That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

48 Stat. 934 Section 5, 25 U.S.C. 465, Indian
Reorganization Act of 1934.

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the

purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (s. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired

pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

8 U.S.C. 1401 (a)(2) Nationally Act of 1940.

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

4 U.S.C. 105, 106 and 109. Buck Act of July 30, 1947.

Section 105(a). "No person shall be

relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that sale or use, with respect to such tax is levied occurred in whole or in part within a federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any federal area within such State to the same extent and with the same effect as though such area was not a federal area.

Section 106(b). "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy

and collect such tax in any federal area within such State to the extent and with the same effect as though such area was not a federal area."

Section 109. "Nothing in Section 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

Title 26. Internal Revenue Code.

Section 1.

Section 1 imposes a tax for each taxable year on the taxable income "of every individual."

Section 61 Gross income defined.

(a) General definition.

Section 61(a) defines gross income as "all income from whatever source derived, including (but not limited to)...gross income derived from business." The Supreme Court has stated that, by this comprehensive language, "the intent of Congress was to levy the tax with respect to all residents of the United States and upon all

sorts of income," without respect to residents' ancestry.

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items. . .

Section 894. Income exempt under treaty.

Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle (Aug. 16, 1954, ch. 736, 68A Stat. 284)

Section 7852. Other applicable rules.

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title. (Aug. 16, 1954, ch. 736, 68A Stat.. 916).

Title 25. Indians.

Section 2210. Tax Exemption. (Amendment to Sec. of Indian Reorganization Act of 1934;

48 Stat. 934)

All lands or interests in land acquired by the United States for an Indian or Indian tribe under authority of this chapter shall be exempt from Federal, State and local taxation.

TREATY WITH THE OMAHA, 1854

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number,

one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the

patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefits, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

APPENDIX B

1866 CONGRESSIONAL GLOBE, 1ST SESS.

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The motion was agreed to; and Messrs. WILSON, ANTHONY, and HENDRICKS were appointed conferees on the part of the Senate.

FORTIFICATION APPROPRIATION BILL.

The Senate proceeded to consider its amendment to the bill (H.R. No. 255) making appropriations for the construction, preservation, and repair of certain fortifications and other works of defense for the year ending June 30, 1867, which was disagreed to by the House of Representatives.

Mr. FESSENDEN. "I move that the Senate insist on its amendment, and agree to the conference asked by the House."

The motion was agreed to; and Messrs. MORGAN, MORRILL, and SAULSBURY were appointed conferees on the part of the Senate.

Mr. MORRILL. "There is a bill on the table which comes from the House of Representatives amended. I desire to call it up and concur in the amendments. It is Senate bill No. 167, to incorporate the Women's Hospital Association of the District of Columbia."

Mr. HOWARD. "It is very nearly one o'clock and I hope the joint resolution to amend the Constitution will be taken up."

Mr. MORRILL. "Let it come up. I move to take it up."

The motion was agreed to; and the Senate proceeded to consider the amendments of the House of Representatives to the bill (S. No. 167) to incorporate the Women's Hospital Association of the District of Columbia.

The PRESIDENT pro tempore. "The first amendment of the House has already been concurred in."

The Secretary read the second amendment of the House of Representatives, which was in the

first section, line three, after the name "Adelaide J. Brown," to strike out all the names to and including that of "Mary K. Lewis," in line seven, except that of "Mary W. Kelly," and to insert "Elmira W. Knap, Mary C. Havermer, Mary Ellen Norment, Jane Thompson, Maria L. Harkness, Isabella Margaret Washington, and Mary F. Smith."

Mr. MORRILL. "I move that the Senate concur in that amendment."

The motion was agreed to.

The next amendment was after the word "Columbia," at the end of section one, to add "by the name of the Columbia Hospital for Women and Lying-in Asylum."

Mr. MORRILL. "I move that the Senate concur in that amendment."

The motion was agreed to.

The next amendment was in section two, line two to strike out the word "twelve" and insert "twenty-four" as the number of directors.

The amendment was concurred in.

The next amendment was in section three, after the word "directors" at the end of line three to insert "to consist of the first twelve of the above-named incorporators."

The amendment was concurred in.

The next amendment was in section fourth, line one, after the word "the" to insert "first twelve."

The amendment was concurred in.

The next amendment was in section five, after the word "Women" in line three, to insert "and Lying-in Asylum."

The amendment was concurred in.

The next amendment was in section five, line four, after the word "with" to insert "board, lodging."

The amendment was concurred in.

The PRESIDENT pro tempore. The amendments are completed.

DEATH OF GENERAL SCOTT.

The PRESIDENT pro tempore laid before the

Senate the following message from the President of the United States:

"To the Senate and House of Representatives

With sincere regret I announce to Congress that Winfield Scott, late lieutenant general in the Army of the United States, departed this life at West Point, in the State of New York, on the 29th day of May instant, at eleven o'clock in the forenoon. I feel well assured that Congress will share in the grief of the nation which must result from its bereavement of a citizen whose high fame is identified with the military history of the Republic.

ANDREW JOHNSON.

WASHINGTON, May 30, 1866"

Mr. WILSON. "I offer the following resolution:

Resolved by the Senate, (the House of Representatives concurring.) That the Committee on Military Affairs and the Militia of the Senate and the Committee on Military Affairs of the House of Representatives, be, and they are

hereby, appointed a joint committee of the two Houses of Congress to take into consideration the message of the President of the United States announcing to Congress the death of Lieutenant General Winfield Scott, and to report what method should be adopted by Congress to manifest their appreciation of the high character, tried patriotism, and distinguished public services of Lieutenant General Winfield Scott, and their deep sensibility upon the announcement of his death."

There being no objection, the Senate proceeded to consider the resolution; and it was adopted unanimously.

Mr. WILSON. "As this committee is to be a joint one, and the resolution will have to be acted on by the House of Representatives, I move, for the present, that the message of the President be laid upon the table, and printed."

The motion was agreed upon.

RECONSTRUCTION.

Mr. HOWARD. "I now move to take up House joint resolution No. 127."

The motion was agreed to; and the Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (H.R. No. 127) proposing an amendment to the Constitution of the United States.

The PRESIDENT pro tempore. "The question is on the amendments proposed by the Senator from Michigan, [Mr. Howard.]"

Mr. HOWARD. "The first amendment is to section one, declaring that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." I do not propose to say anything on that subject except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the

limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country."

The PRESIDENT pro tempore. "The first amendment proposed by the Senator from Michigan will be read."

The Secretary read the amendment, which was in line nine, after the words "section one," to insert:

"All persons born in the United States, and

subject to the jurisdiction thereof, are citizens of the United State wherein they reside.

So that the section will read:

Sec. 1. All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. DOOLITTLE. "I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment-I presume he will have no objection to it-by inserting after the word "thereof" the words "excluding Indians not taxed." The amendment would then read:

All persons born in the United States, and subject to the jurisdiction thereof, excluding Indians not taxed, are citizens of the United States and of the States wherein they reside."

Mr. HOWARD. "I hope that amendment to the amendment will not be adopted. Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations."

Mr. COWAN. "The honorable Senator from Michigan has given this subject, I have no doubts, a good deal of his attention, and I am really desirous to have a legal definition of "citizenship of the United States." What does it mean? What is its length and breadth? I would be glad if the honorable Senator in good earnest would favor us with some such

definition. Is the child of the Chinese immigrant in California a citizen? Is a child of Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they any more rights than a sojourner in the United States? If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word.

It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power. He is not entitled, by virtue of that, to be an elector. An elector is one who is chosen by the people to perform that function, just the same as an officer is one

chosen by the people to exercise the franchises of an office. Now, I should like to know, because really I have been puzzled for a long while and have been unable to determine exactly, either from conversation with those who ought to know, who have given this subject their attention, or from the decisions of the Supreme Court, the lines and boundaries which circumscribe that phrase, "citizen of the United States." What is it?

So far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States. It has been so considered in the State of Pennsylvania; and aliens and others who acknowledge no allegiance,

either to the State or to the General Government, may be limited and circumscribed in that particular. I have supposed, further, that it was essential to the existence of society itself, and particularly essential to the existence of a free State, that it should have the power, not only of declaring who should exercise political power within its boundaries, but that if it were overrun by another and a different race, it would have the right to absolutely expel them. I do not know that there is any danger to many of the States in this Union; but is it proposed that the people of California..."

"...Are they to be immigrated out of house and home by Chinese? I should think not. It is not supposed that the people of California, in a broad and general sense, have any higher rights than the people of China; but they are in possession of the country of California and if another people of a different race, of different religion, of different manners, or different

traditions, different tastes and sympathies are to come there and have the free right to locate there and settle among them, and if they have an opportunity of pouring in such an immigration as in a short time will double or triple the population of California, I ask are the people of California powerless to protect themselves? I do not know that the contingency will ever happen, but it may be well to consider it while we are on this point.

As I understand the rights of the States under the Constitution at present, California has the right, if she deems it proper, to forbid the entrance into her territory of any person she chooses who is not a citizen of some one of the United States. She cannot forbid his entrance; but unquestionably, if she was likely to be invaded by a flood of Australians or people from Borneo, man-eaters or cannibals if you please, she would have the right to say that those people should not come there. It depends

upon the inherent character of the men. Why, sir, there are nations of people with whom that is a virtue and falsehood a merit. There are people to whom polygamy is as natural as monogamy is with us. It is utterly impossible that these people can meet together and enjoy their several rights and privileges which they suppose to be natural in the same society; and it is necessary, a part of the nature of things, that society shall be more or less exclusive. It is utterly and totally impossible to mingle all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian in the same society.

It must be evident to every man intrusted with the power and duty of legislation, and qualified to exercise it in a wise and temperate manner, that these things cannot be; and in my judgment there should be some limitation, some definition to this term "citizen of the United States". What is it? Is it simply to put a man in a condition that he

may be an elector in one of the States? Is it to put him in a condition to have the right to enter the United States courts and sue? Or is it only that he is entitled as a sojourner to the protection of the laws while he is within and under the jurisdiction of the courts? Or is it to set him upon some pedestal, some position, to put him out of the reach of State legislation and State power?

Sir, I trust I am as liberal as anybody toward the rights of all people, but I am unwilling, on the part of my State, to give up the right that she claims, and that she may exercise, and exercise before very long, of expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own-an imperium in the imperio; who pay no taxes; who never perform military service; who do nothing, in

fact, which becomes the citizen, and perform none of the duties which devolve upon him, but, on the other hand, have no homes, pretend to own no land, live nowhere, settle as trespassers where ever they go and whose sole merit is a universal swindle; who delight in it, who boast of it, and whose adroitness and cunning is of such a transcendent character that no skill can serve to correct it or punish it; I mean the Gypsies. they wander in gangs in my State. They follow no ostensible pursuit for a livelihood. They trade horses, tell fortunes, and things disappear mysteriously. Where they came from nobody knows. Their very origin is lost in mystery. No man today can tell from whence the Zingara come or whither they go, but it understood that they are a distinct people. They never intermingle with any other. They never intermarry with any other. I believe there is no instance on record where a Zingara woman has mated with a man of any other race, although it is true that sometimes the males of

that race may mate with the females of others but I think there is no case in history where it can be found that a woman of that race, so exclusive are they, and so strong are their sectional antipathies, has been known to mate with a man of another race. These people live in the country and are born in the country. They infest society. They impose upon the simple and the weak everywhere. Are those people, by a constitutional amendment, to be put out of the reach of the State in which they live? I mean as a class. If the mere fact of being born in the country confers that right, then they will have it; and I think it will be mischievous. I think the honorable Senator from Michigan would not admit the right that the Indians of his neighborhood would have to come in upon Michigan and settle in the midst of that society and obtain the political power of the State, and wield it, perhaps, to his exclusion. I do not know that anybody would agree to that.

It is true that our race are not subjected to dangers from that quarter, because we are the strongest, perhaps; but there is a race in contact with this country which, in all characteristics except that of simply making fierce war, it not only our equal, but perhaps our superior. I mean the yellow race; the Mongol race. They outnumber us largely. Of their industry, their skill, and their pertinacity in all worldly affairs, nobody can doubt. They are our neighbors. Recent improvement, the age of fire, has brought their coasts almost in immediate contact with our own. distance is almost annihilated. They may pour in their millions upon our Pacific coast, in a very short time. Are the States to lose control over this immigration? Is the United States to determine that they are to be citizens? I wish to be understood that I consider those people to have rights just the same as we have, but not rights in connection with our Government. If I desire the exercise

of my rights I ought to go to my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different in all those respects from myself. I would not claim that right. Therefore I think, before we assert broadly that everybody who shall be born in the United States shall be taken to be a citizen of the United States, we ought to exclude others besides Indians not taxed, because I look upon Indians not taxed as being much less dangerous and much less pestiferous to society than I look upon Gypsies. I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow-citizens regard them. I have no doubt that within proper restraints, allowing that State and the other Pacific States to manage them as they may see it, they may be useful; but I would not tie their hands by the Constitution of the United

States so as to prevent them hereafter from dealing with them as in their wisdom they see it."

Mr. CONNESS. "Mr. President, I have failed to learn, from what the Senator has said, what relation what he has said has to the first section of the constitutional amendment before us; but that part of the question I propose leaving to the honorable gentleman who has charge of this resolution. As, however, the State of California has been so carefully guarded from time to time by the Senator from Pennsylvania and others, and the passage, not only of this amendment, but of the so-called civil rights bill, has been deprecated because of its pernicious influence upon society in California, owing to the contiguity of the Chinese and Mongolians, to that favored land, I may be excused for saying a few words on the subject.

If my friend from Pennsylvania, who professes to know all about Gypsies and little

about Chinese, knew as much of the Chinese, and their habits as he professes to do of the Gypies, (and which I concede to him, for I know nothing to the contrary,) he would not be alarmed in our behalf because of the operation of the proposition before the Senate, or even the proposition contained in the civil rights bill, so far as it involved the Chinese and us.

The proposition before us, I will say, Mr. President, relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.

Now, I will say, for the benefit of my friend, that he may know something about the Chinese in future, that this portion of our population, namely, the children of Mongolian parentage, born in California, is very small indeed, and never promises to be large, notwithstanding our near neighborhood to the Celestial land. The habits of those people, and their religion, appear to demand that they all return to their own country at some time or other, either alive or dead. There are, perhaps, in California today about forty thousand Chinese—from forty to forty-five thousand. Those people invariably, while others take their places, and, as I before observed, if they do not return alive their bones are carefully gathered up and sent back to the Flowery Land. It is not an unusual circumstance that the clipper ships trading between San Francisco and China carry at a time three or four hundred human remains of these Chinese. When interred in our State they are not interred

deep in the earth, but laid very near the surface, and then mounds of earth are laid over them, so that the process of disinterment is very easy. That is their habit and custom; and as soon as they are fit for transmission to their own country they are taken up with great regularity and sent there. None of their bones are allowed to remain. They will return, then, either living or dead.

Another feature connected with them is, that they do not bring their females to our country but in very limited numbers, and rarely ever in connection with families; so that their progeny in California is very small indeed. From the description we have had from the honorable Senator from Pennsylvania of the Gypsies, the progeny of all Mongolians in California is not so formidable in numbers as that of the Gypsies in Pennsylvania. We are not troubled with them at all. Indeed, it is only in exceptional cases that they have children in our State; and

therefore the alarming aspect of the application of this provision to California, or any other land to which the Chinese may come as immigrants, is simply a section in the brain of persons who deprecate it, and that alone.

I wish now to address a few words to what the Senator from Pennsylvania has said as to the rights that California may claim as against incursion of objectionable population from other States and countries. The State of California at various times has passed laws restrictive of Chinese immigration. It will be remembered that the Chinese came to our State as others did from all parts of the world, to gather gold in large quantities, it being found there. The interference with our own people in the mines by them was deprecated by and generally objectionable to the miners in California. The Chinese are regarded, also, not with favor as an addition to the population in a social point of view; not that there is any intercourse between the two classes of persons there, but they are

not regarded as pleasant neighbors; their habits are not of a character that make them at all an inviting class to have near you, and the people so generally regard them. But in their habits otherwise, they are a docile, industrious people, and they are now passing from mining into other branches of industry and labor. They are found employed as servants in a great many families and in the kitchens of hotels; they are found as farm hands in the fields; and latterly they are employed by thousands - indeed, I suppose there are from six to seven thousand of them now employed in building the Pacific railroad. They are there found to be very valuable laborers, patient and effective; and, I suppose, before the present year closes, ten or fifteen thousand of them, at least, will be employed on that great work.

The State of California has undertaken, at different times, to pass restrictive statutes as to the Chinese. The State has imposed a tax on

their right to work the mines, and collected it ever since the State has been organized—a tax of four dollars a month on each Chinaman; but the Chinese could afford to pay that and still work in the mines, and they have done so. Various acts have been passed imposing a poll tax or head tax, a capitation tax, upon their arrival at the port of San Francisco; but all such laws, when tested before the supreme court of the State of California, the supreme tribunal of that people, have been decided to be unconstitutional and void."

Mr. HOWARD. "A very just and constitutional decision, undoubtedly."

Mr. CONNESS. "Those laws have been tested in our own courts, and when passed under the influence of public feeling there they have been declared again and again by the supreme court of the State of California to be void, violative of our treaty obligations, an interference with the commerce of the nation. Now, then, I beg the honorable Senator from Pennsylvania, though it

may be very good capital in an electioneering campaign to declaim against the Chinese, not to give himself any trouble about the Chinese, but to confine himself entirely to the injurious effects of this provision upon the encouragement of a Gypsy invasion of Pennsylvania. I had never heard myself of the invasion of Pennsylvania by Gypsies. I do not know, and I do not know that the honorable Senator can tell us, how many Gypsies the census shows to be within the State of Pennsylvania. The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State, and more to be feared and more feared, than that of Gypsies. It was an invasion of rebels, which this amendment, if I understand it right, is intended to guard against and to prevent the recurrence of. On that occasion I am not aware, I do not remember that the State of Pennsylvania claimed the exclusive right of expelling the invaders, but

on the contrary my recollection is that Pennsylvania called loudly for the assistance of her sister States to aid in the expulsion of those invaders—did not claim it as a State right to exclude them, did not think it was a violation of the sovereign rights of the State when the citizens of New York and New Jersey went to the field in Pennsylvania and expelled those invaders.

But why all this talk about Gypsies and Chinese? I have lived in the United States for many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life. It cannot be because they have increased so much of late. It cannot be because they have been felt to be particularly oppressive in this or that locality. It must be that the Gypsy element is to be added to our political agitation, so that hereafter the Negro alone shall not claim our entire attention. Here is a simple declaration that a score or a few score of human beings born

in the United States shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having or claiming to have a high humanity passes all my understanding and comprehension.

Mr. President, let me give an instance here, in this connection, to illustrate the necessity of the civil rights bill in the State of California; and I am quite aware that what I shall say will go to California, and I wish it to do so. By the influence of our "southern brethren," who I will not say invaded California, but who went there in large numbers some years since, and who seized political power in that State and used it, who made our statutes and who expounded our statutes from the bench, Negroes were forbidden to testify in the courts of law of that State, and Mongolians were

forbidden to testify in the courts; and therefore for many years, indeed, until 1862, the State of California held officially that a man with a black skin could not tell the truth, could not be trusted to give a relation in a court of law of what he saw and what he knew. In 1862 the State Legislature repealed the law as to Negroes, but not as to Chinese. Where white men were parties the statute yet remained, depriving the Mongolian of the right to testify in a court of law. What was the consequence of preserving that statute? I will tell you. During the four years of rebellion a good many of our "southern brethren" in California took upon themselves the occupation of what is there technically called "road agents." It is a term well known and well understood there. They turned out upon the public highways, and became robbers, highway robbers; they seized the treasure transmitted and conveyed by the express companies, by our stage lines, and in one instance made a very heavy seizure, and claimed

that it was done in accordance with the authority of the so-called confederacy. But the authorities of California hunted them down, caught a few of them, and caused them to be hanged, not recognizing the commission of Jeff Davis for those kinds of transactions within our bounds. The spirit of insubordination and violation of law, promoted and encouraged by rebellion here, affected us so largely that large numbers of-I will not say respectable southern people, and I will not say that it was confined to them alone-but large numbers of persons turned out upon the public highways, so that robbery was so common upon the highways, particularly in the interior and in the mountains of that State, that it was not wondered at, but the wonder was for anybody that traveled on the highways to escape robbery. The Chinese were robbed with impunity, for if a white man was not present no one could testify against the offender. They were robbed and

plundered and murdered, and no matter how many of them were present and saw the perpetration of those acts, punishment could not follow, for they were not allowed to testify. Now, sir, I am very glad indeed that we have determined at length that every human being may relate what he heard and saw in a court of law when it is required of him, and that our jurors are regarded as of sufficient intelligence to put the right value and construction upon what is stated.

So much for what has been said in connection with application of this provision to the State that I in part represent here. I beg my honorable friend from Pennsylvania to give himself no further trouble on account of the Chinese in California or on the Pacific coast. We are fully aware of the nature of that class of people and their influence among us, and are entirely able to take care of them and to provide against any evils that may flow from their presence among us. We are entirely ready

to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."

Mr. HOWARD. "There is a typographical error in the amendment now under consideration. The word "State" in the eleventh line is printed "States". It should be in the singular instead of the plural number, so as to read "all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State" (not States) "wherein they reside." I move that that correction be made."

Mr. JOHNSON. "I suggest to the Senator from Michigan that it stands just as well as it is."

Mr. HOWARD. "I wish to correct the error of the printer; it is printed "States" instead of "State"."

The PRESIDENT pro tempore. "The question is on the amendment proposed by the Senator from Wisconsin" to the amendment of the Senator from Michigan to the resolution before the Senate."

Mr. DOOLITTLE. "I moved this amendment because it seems to me very clear that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States. All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military. We appoint civil agents who have a control over them in behalf of the Government. We have our military commanders in the neighborhood of the reservations, who have complete control. For instance, there are seven or eight thousand Navajoes at this moment under the control of General Carlton, in New Mexico, upon the Indian reservations, managed, controlled, fed at the expense of the United States, and fed by the War Department, managed by the War Department, and at a cost to this

Government of almost a million and a half of dollars every year. Because it is managed by the War Department, paid out of the commissary fund and out of the appropriations for quartermasters' stores, the people do not realize the enormous expense which is upon their hands. Are these six or seven thousand Navajoes to be made citizens of the United States? Go into the State of Kansas, and you find there any number of reservations, Indians in all stages, from the wild Indian of the plains, who lives on nothing but the meat of the buffalo, to those Indians who are partially civilized and have partially adopted the habits of civilized life. So it is in other States. In my own State there are the Chippewas, the remnants of the Winnebagoes, and the Pottawatomica. There are tribes in the State of Minnesota and other States of the Union. Are these persons to be regarded as citizens of the United States, and by a constitutional amendment declared to be

such, because they are born within the United States and subject to our jurisdiction?

Mr. President, the word "citizen" if applied to them, would bring in all the digger Indians of California. Perhaps they have mostly disappeared; the people of California, perhaps, have put them out of the way; but there are the Indians of Oregon and the Indians of the Territories. Take Colorado, there are more Indian citizens of Colorado than there are white citizens this moment if you admit it as a State. And yet by a constitutional amendment you propose to declare the Utes, the Tabnuacnes, and all those wild Indians to be citizens of the United States, the great Republic of the world, whose citizenship should be a tifle as proud as that of king, and whose danger is that you may degrade that citizenship.

Mr. President, citizenship, if conferred, carries with it, as a matter of course, the rights, the responsibilities, the duties, the immunities, the privileges of citizens, for that

is the very object of this constitutional amendment to extend. I do not intend to address the Senate at length on this question now. I have simply raised the question. I think that it would be exceedingly unwise not to adopt this amendment and to put in the Constitution of the United States the broad language proposed. Our fathers certainly did not act in this way, for in the Constitution as they adopted it they excluded the Indians who are not taxed; did not enumerate them, indeed, as a part of the population upon which they based representation and taxation; much less did they make them citizens of the United States.

Mr. President, before the subject of the constitutional amendment passes entirely from the Senate, I may desire to avail myself of the opportunity to address the body more at length; but now I simply direct what I have to say to the precise point contained in the amendment which I have submitted."

Mr. FESSENDEN. "I rise not to make any remarks on this question, but to say that if there is any reason to doubt that this provision does not occur all the wild Indians, it is a serious doubt; and I should like to hear the opinion of the chairman of the Committee on the Judiciary, who has investigated the civil rights bill so thoroughly, on the subject, or any other gentleman, who has looked at it. I had the impression that it would not cover them."

Mr. TRUMBULL. "Of course my opinion is not any better than that of any other member of the Senate; but it is very clear to me that there is nothing whatever in the suggestions of the Senator from Wisconsin. The provision is, that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens." That means "subject to the complete jurisdiction thereof". Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by

"subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them. If we want to control the Navajoes, or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? Do we pass a law to control them? Are they subject to to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty? The Senator himself has brought before us a great many treaties this session in order to get control of those people.

If you introduce the words "not taxed," that is a very indefinite expression. What does

"excluding Indians not taxed" mean? You will have just as much difficulty in regard to those Indians that you say are in Colorado, where there are more Indians than there are whites. Suppose they have property there, and it is taxed; then they are citizens."

Mr. WADE. "And ought to be."

Mr. TRUMBULL. "The Senator from Ohio says they ought to be. If they are there and within the jurisdiction of Colorado, and subject to the laws of Colorado, they ought to be citizens; and that is all that is proposed. It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is "subject to the jurisdiction of the United States". Would the Senator from Wisconsin think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life? Would he think of punishing them for instituting among themselves their own tribal regulations? Does

the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them. It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.

It seems to me, sir, that to introduce the words suggested by the Senator from Wisconsin would not make the proposition any clearer than it is, and that it by no means embraces, or by any fair construction-by any construction, I may say-could embrace the wild Indians of the plains or any with whom we have treaty relations, for the very fact that we have treaty relations with them shows that they are not subject to our

jurisdiction. We cannot make a treaty with ourselves; it would be absurd. I think that the proposition is clear and safe as it is."

Mr. JOHNSON. "Mr. President, the particular question before the Senate is whether the amendment proposed by the Senator from Wisconsin shall be adopted. But while I am up, and before I proceed to consider the necessity for that amendment, I will say a word or two upon the proposition itself; I mean that part of section one which is recommended as an amendment to the old proposition as it originally stood.

The Senate are not to be informed that very serious questions have arisen, and some of them have given rise to embarrassments, as to who are citizens of the United States, and what are the rights which belong to them as such; and the object of this amendment is to settle that question. I think, therefore, with the committee to whom the matter was referred, and by whom the report has been made, that it is very advisable in some form or other to define

what citizenship is; and I know no better way of accomplishing that than the way adopted by the committee. The Constitution as it now stands recognizes a citizenship of the United States. It provides that no person shall be eligible to the Presidency of the United States except a natural-born citizen of the United States or one who was in the United States at the time of the adoption of the Constitution; it provides that no person shall be eligible to the office of Senator who has not been a citizen of the United States for nine years; but there is no definition in the Constitution as it now stands as to citizenship. Who is a citizen of the United States is an open question. The decision of the courts and the doctrine of the commentators is, that every man who is a citizen of a State becomes ipso facto a citizen of the United States; but there is no definition as to how citizenship can exist in the United States except through the medium of a citizenship in a

State.

Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States. I am, however, by no means prepared to say, as I think I have intimated before, that being born within

the United States, independent of any new constitutional provision on the subject, creates the relation of citizen of the United States.

The amendment proposed by my friend from Wisconsin I think, and I submit it to the Senate, should be adopted. The honorable member from Illinois seems to think it unnecessary, because, according to his interpretation of the amendment as it stands, it excludes those who are proposed to be excluded by the amendment of ~~the~~ Senator from Wisconsin, and he thinks that that is done by saying that those only who are born in the United States are to become citizens thereof, who at the time of birth are "subject to the jurisdiction thereof," and he supposes and states very positively that the Indians are not subject to the jurisdiction of the United States. With due deference to my friend from Illinois, I think he is in error. They are within the territorial limits of the United States. If they were not, the provision would

be altogether inapplicable to them. In one sense, therefore, they are a part of the people of the United States, and independent of the manner in which we have been dealing with them it would seem to follow necessarily that they are subject to the jurisdiction of the United States as is anybody else who may be born within the limits of the United States. But when the United States took possession-England for us in the beginning, and our limits have been extended since-of the territory which was originally peopled exclusively by the Indians, we found it necessary to recognize some kind of a national existence on the part of the aboriginal settlers of the United States; but we were under no obligation to do so, and we are under no constitutional obligation to do so now, for although we have been in the habit of making treaties with these several tribes, we have also, from time to time, legislated in relation to the Indian tribes. We punish murder committed within the territorial limits in which

the tribes are to be found. I think my friend from Illinois is wrong in supposing that that is not done."

Mr. TRUMBULL. "Not except where it is done under special provision-not with the wild Indians of the plains."

Mr. JOHNSON. "By special provision of legislation. That I understand. I am referring to that."

Mr. TRUMBULL. "We propose to make citizens of those brought under our jurisdiction in that way. Nobody objects to that, I reckon."

Mr. JOHNSON. "Yes, I do. I am not objecting at all to their being citizens now; what I mean to say, is that overall the Indian tribes within the limits of the United States, the United States may-that is the test-exercise jurisdiction. Whether they exercise it in point of fact is another question; whether they propose to govern them under the treaty-making power is quite another question; but the

question as to the authority to legislate is one, I think, about which, if we were to exercise it, the courts would have no doubt; and when, therefore, the courts come to consider the meaning of this provision, that all persons born within the limits of the United States and subject to the jurisdiction thereof are citizens, and are called upon to decide whether Indians born within the United States, with whom we are now making treaties are citizens, I think they will decide that they have become citizens by virtue of this amendment. But at any rate, without expressing any decided opinion to that effect, as I would not do when the honorable member from Illinois is so decided in the opposite opinion, when the honorable member from Wisconsin, to say nothing of myself, entertains a reasonable doubt that Indians would be embraced within the provision, what possible harm can there be in guarding against it? It does not affect the constitutional amendment in any way. That is not my purpose, and I presume

is not the purpose of my friend from Wisconsin.

The honorable member from Illinois says that the terms which the member from Wisconsin proposed to insert would leave it very uncertain. I suppose that my friend from Illinois agreed to the second section of this constitutional amendment, and these terms are used in that section. In apportioning the representation, as you propose to do by virtue of the second section, you exclude from the basis "Indians not taxed." What does that mean? The honorable member from Illinois says that that is very uncertain. What does it mean? It means, or would mean if inserted in the first section, nothing, according to the honorable member from Illinois. Well, if it means nothing inserted in the first section it means nothing where it is proposed to insert it in the second section. But I think my friend from Illinois will find that these words are clearly understood and have always been

understood; they are now almost technical terms. There are found, I think, in nearly all the statutes upon the subject; and if I am not mistaken, the particular statute upon which my friend from Illinois so much relied as one necessary to the peace of the country, the civil rights bill, has the same provision in it, and that bill I believe was prepared altogether, or certainly principally, by my friend from Illinois. I read now from the civil rights bill as it passed:

"That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens."

What did these words mean? They meant something; and their meaning as they are inserted in that act is the same meaning which will be given to them if they are inserted in the first section of this constitutional amendment. But I conclude by saying that when we are trying to settle this, among other

questions, for all time, it is advisable-and if my friend will permit me to say so, our clear duty-to put every provision which we adopt in such plain language as not to be capable of two interpretations, if we can. When Senators upon the floor maintain the opinion that as it now stands it is capable of an interpretation different from that which the committee mean, and the amendment proposed gets clear of that interpretation which the committee do not mean, why should we not adopt it?

I hope, therefore, that the friends-and I am the friend of this provision as far as we have gone in it-that the friends of this constitutional amendment will accept the suggestion of the honorable member from Wisconsin."

Mr. TRUMBULL. "The Senator from Maryland certainly perceives a distinction between the use of the words "excluding Indians not taxed," in the second section and in the first. The

second section is confined to the States; it does not embrace the Indians of the plains at all. That is a provision in regard to the apportionment of representation among the several States."

Mr. JOHNSON. "The honorable member did not understand me. I did not say it meant the same thing."

Mr. TRUMBULL. "I understood the Senator, I think. I know he did not say that the clause in the second section was extended all over the country, but he did say that the words "excluding Indians not taxed were in the second section, and inasmuch as I had said that those words were of uncertain meaning, therefore, having gone for the words in the second section I was guilty of a great inconsistency. Now I merely wish to show the Senator from Maryland that the words in the second section may have a very clear and definite meaning, when in the first section they would have a very uncertain meaning, because they are applied under very

different circumstances. The second section refers to no person except those in the States of the Union; but the first section refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia. Therefore the criticism upon the language that I had used, it seems to me, is not a just one.

But the Senator wants to insert the words, "excluding Indians not taxed." I am not willing to make citizenship in this country depend on taxation. I am not willing, if the Senator from Wisconsin is, that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen. If you put in those words in regard to citizenship, what do you do? You make a distinction in that respect, if you put it on the ground of taxation. We had a discussion on the civil rights bill as to the meaning of these words, "excluding Indians not taxed". The Senator from Maryland, [Mr.

Johnson,] I think, on that occasion gave this definition to the phrase "excluding Indians not taxed," that it did not allude to the fact of taxation simply but it meant to describe a class of persons; that is, civilized Indians. I was inclined to fall into that view. I was inclined to adopt the suggestion of the Senator from Maryland, that the words "excluding Indians not taxed" did not mean literally excluding those upon whom a tax was not assessed and collected, but rather meant to define a class of persons, meaning civilized Indians; and I think I gave that answer to the Senator from Indiana, [Mr. Hendricks,] who was disposed to give it the technical meaning that "Indians not taxed" meant simply those upon whom no tax was laid. If it does mean that, then it would be very objectionable to insert those words here, because it would make of a wealthy Indian a citizen and would not make a citizen of one not possessed of wealth under the same circumstances. This is the uncertainty in

regard to the meaning of those words. The Senator from Maryland and myself, perhaps, would understand them alike as embracing all Indians who were not civilized; and yet, if you insert that language, "Indians not taxed," other persons may not understand them that way; and I remember that the Senator from Indiana was disposed to understand them differently when we had the discussion upon the civil rights bill. Therefore I think it better to avoid these words and that the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same.

I have already replied to the suggestion as to the Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States; and the Senator from Maryland, if he will look into our statute will search in vain for any means of trying

these wild Indians. A person can only be tried for a criminal offense in pursuance of laws, and he must be tried in a district which must have been fixed by law before the crime was committed. We have had in this country, and have today, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them. They would not be embraced by this provision.

For these reasons I think this language is better than the language employed by the civil rights bill."

Mr. HENDRICKS. "Will the Senator from Illinois allow me to ask him a question before he sits down?"

Mr. TRUMBULL. "Certainly."

Mr. HENDRICKS. "I wish to know if, in his opinion, it is not a matter of pleasure on the

part of the Government of the United States, and especially of Congress, whether the laws of the United States be extended over the Indians or not; if it is not a matter to be decided by Congress aloud whether we treat with the Indians by treaty or govern them by direct law; in other words, whether Congress has not the power at its pleasure to extend the laws of the United States over the Indians and to govern them."

Mr. TRUMBULL. "I suppose it would have the same power that it has to extend the laws of the United States over Mexico and govern her if in our discretion we thought proper to extend the laws of the United States over the republic of Mexico, or the empire of Mexico, if you please so to call it, and had sufficient physical power to enforce it. I suppose you may say in this case we have the power to do it, but it would be a violation of our treaty obligations, a violation of the faith of this nation, to extend our laws over these Indian tribes with whom we

have made treaties saying we would not do it."

Mr. FESSENDEN. "We could extend it over Mexico in the same way."

Mr. TRUMBULL. "I say we could extend it over Mexico just as well; that is, if we have the power to do it. Congress might declare war, or, without declaring war, might extend its laws, or profess to extend them over Mexico, and if we had the power we could enforce that declaration; but I think it would be a breach of good faith on our part to extend the laws of the United States over the Indian tribes with whom we have these treaty stipulations, and in which treaties we have agreed that we would not make them subject to the laws of the United States. There are numerous treaties of that kind."

Mr. VAN WINKLE. "If the Senator will permit me, I wish to remind him of a citation from a decision of the Supreme Court that he himself made here, I think, when the veto of the civil rights bill was under discussion; and if I correctly understood it, as he read it, the

Supreme Court decided that these untaxed Indians were subjects, and distinguished between subjects and citizens."

Mr. TRUMBULL. "I think there are decisions that treat them as subjects in some respects. In some sense they are regarded as within the territorial boundaries of the United States, but I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here. The language seems to me to be better chosen than it was in the other bill. There is a difficulty about the words, "Indians not taxed." Perhaps one of the reasons why I think so is because of the persistency with which the Senator from Indiana himself insisted that the phrase "excluding Indians not taxed," the very words which the Senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax; that that was the meaning of it, we must take it

literally. The Senator from Maryland did not agree to that, nor did I; but if the Senator from Indiana was right, it would receive a construction which I am sure the Senator from Wisconsin would not before; for if these Indians come within our limits and within our jurisdiction and are civilized, he would just as soon make a citizen of a poor Indian as of a rich Indian."

Mr. HENDRICKS. "I expected the Senator from Illinois, being a very able lawyer, at the head of the Judiciary Committee, to meet the question that I asked him and to answer it as a question of law, and not as a question of military power. I did not ask him the question whether the Government of the United States had the military power to go into the Indian territory and subjugate the Indians to the political power of the country; nor had he a right to understand the question in that sense. I asked him the question whether, under the Constitution, under the powers of the Government, we may extend our

laws over the Indians and compel obedience, as a matter of legal right from the Indians. If the Indian is bound to obey the law he is subject to the jurisdiction of the country; and that is the question I desired the Senator to meet as a legal question, whether the Indian would be bound to obey the law which Congress in express terms extended over him in regard to questions within the jurisdiction of Congress.

Now, sir, this question has once or twice been decided by the Attorney General, so far as he could decide it. In 1833 he was inquired of whether the laws of the United States regulating the intercourse with the Indian tribes, by the general legislation in regard to Oregon, had been extended to Oregon; and he gave it as his opinion that the laws had been extended to Oregon, and regulated the intercourse between the white people and the Indians there. Subsequently, the Attorney General was asked whether Indians were citizens of the United

States in such sense as that they could become the owners of the public lands where the right to acquire them was limited to citizens; and in the course of that opinion he says that the Indian is not a citizen of the United States by virtue of his birth, but that he is a subject.

He says:

"The simple truth is plain that the Indians are the subjects of the United States, and therefore are not, by mere right of home birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituents ingredients of the Government. This distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law."

He then cites some authorities. Again, he says:

"Not being citizens of the United States by mere birth, can they become so by naturalization? Undoubtedly."

"But they cannot become citizens by naturalization under existing general acts of Congress (2 Kent's Commentaries; page 72)."

"Those acts apply only to foreigners, subjects of another allegiance. The Indians are not foreigners, and they in our allegiance without being citizens of the United States."

Mr. JOHNSON. "Whose opinion is that?"

Mr. HENDRICKS. "That is the opinion of Mr. Cushing, given on the 5th of July, 1856. I did not intend to discuss this question, but I will make one further reply to the Senator from Illinois. When the civil rights bill was under consideration I was of the opinion that the term "not taxed" meant not taxed; and when words are plain in the law I take them in their natural

sense. When there is no ambiguity the law says there shall be no construction; and when you say a man is not taxed I presume it means that he is not taxed. I do not know any words that express the meaning more clearly than the words themselves, and therefore I cannot express the meaning in any more apt words than the words used by the Senator from Wisconsin, "Indians not taxes". When I said that that was making citizenship to rest upon property I recollect, or I think I do, the indignant terms in which the Senator from Illinois then replied, conveying the idea that it was a demagogical argument in this body to speak of a subject like that: and yet today he says to the Senator from Wisconsin that it is not a statesmanlike proposition. He makes the same point upon the Senator from Wisconsin which he undertook to make upon me on the civil rights bill.

If it is the pleasure of Congress to make the wild Indians of the desert citizens, and then if three-fourths of the States agree to it,

I presume we will get along the best way we can; and what shall then be the relations between these people and the United States will be for us and for our descendants to work out. They are not now citizens; they are subjects. For surely, as a matter of policy we regulate our intercourse with them to a large extent by treaties, so as that they shall assent to the regulations that govern them. That is a matter of policy, but we need not treat with an Indian. We can make him obey our laws, and being liable to such obedience he is subject to the jurisdiction of the United States. I did not intend to discuss this question, but I got into it by the inquiry I made of the Senator from Illinois."

Mr. HOWARD. "I hope, sir, that this amendment will not be adopted. I regard the language of the section as sufficiently certain and definite. If amended according to the suggestion of the honorable Senator from

Wisconsin it will read as follows:

All persons born in the United States, and subject to the jurisdiction thereof, exclusive [of] Indians not taxed, are citizens of the United States, and of the State they reside.

Suppose we adopt the amendment as suggested by the honorable Senator from Wisconsin, in what condition will it leave us as to the Indian tribes wherever they are found? According to the ideas of the honorable Senator, as I understand them, this consequence would follow: all that would remain to be done on the part of any State would be to impose a tax upon the Indians, whether in their tribal condition or otherwise, in order to make them citizens of the United States. Does the honorable Senator from Wisconsin contemplate that? Does he propose to leave this amendment in such a condition that the State of Wisconsin, which he so ably represents here, will have the right to impose taxes upon the Indian tribes within her limits, and thus make of these Indians constituting the

tribes, no matter how numerous, citizens of the United States and of the State of Wisconsin? That would be the direct effect of his amendment if it should be adopted. It would, in short, be a naturalization, whenever the States saw fit to impose a tax upon the Indians, of the whole Indian race, within the limits of the States."

Mr. CLARK. "The Senator will permit me to suggest a case. Suppose the State of Kansas, for instance, should tax her Indians for five years, they would be citizens."

Mr. HOWARD. "Undoubtedly."

Mr. CLARK. "But if she refuse to tax them for the next ten years how would they be then? Would they be citizens or not?"

Mr. HOWARD. "I take it for granted that when a man becomes a citizen of the United States under the Constitution he cannot cease to be a citizen, except by expatriation or the commission of some crime by which his citizenship shall be forfeited."

Mr. CLARK. "If it depends upon taxation."

Mr. HOWARD. "The continuance of the quality of citizenship would not, I think, depend upon the continuance of taxation."

Mr. CLARK. "But still he would be an "Indian not taxed."

Mr. HOWARD. "He has been taxed once."

Mr. CLARK. "The point I wish to bring the Senator to is this: would not the admission of a provision of that kind make a sort of shifting use of the Indians?"

Mr. HOWARD. "It might, depending upon the construction which would happen to be given by the courts to the language of the Constitution. The great objection, therefore, to the amendment is, that it is an actual naturalization, whenever the State sees fit to enact a naturalization law in reference to the Indians in the shape of the imposition of a tax, of the whole Indian population within their limits. There is no evading this consequence, but still I cannot impute to the honorable Senator from

Wisconsin a purpose like that. I think he has misapprehended the effect of the language which he suggests. I think the language as it stands is sufficiently certain and exact. It is that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I concur entirely with the honorable Senator from Illinois, in holding that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born

within the limits of a State, is subject to this full and complete jurisdiction. That question has long since been adjudicated, so far as the usage of the Government is concerned. The Government of the United States have always regarded and treated the Indian tribes within our limits as foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, for in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States; but also with the Indian tribes. That clause in my judgment presents a full and complete recognition of the national character of the Indian tribes, the same character in which they have been recognized ever since the discovery of the continent and its occupation by civilized men; the same light in which the Indians were viewed, and treated by Great Britain from the earliest commencement of the settlement of the continent. They have

always been regarded, even in our ante-revolutionary history, as being independent nations, with whom the other nations of the earth have held treaties, and in no case, I believe, has either the Government of Great Britain or of the United States recognized the right of an individual Indian to transfer or convey lands. Why? If he was a citizen, in other words, if he was not a subject of a foreign Power, if he did not belong to a tribe whose common law is that land as well as almost every other description of property shall be held in common among the members of the tribe, subject to a chief, why is it that the reservation has been imposed and always observed upon the act of conveyance on the part of the Indians?

A passage has been read from an opinion given by Mr. Attorney General Cushing on this subject, in which, it seems to me, he takes great liberties with the Constitution in

speaking of the Indian a being a subject of the United States. Certainly I do not so hold; I cannot so hold, because it has been the habit of the Government from the beginning to treat with the Indians tribes as sovereign Powers. The Indians are our wards. Such is the language of the courts. They have a national independence. They have an absolute right to the occupancy of the soil upon which they reside; and the only ground of claim which the United States has ever put forth to the proprietorship of the soil of an Indian territory is simply the right of preemption; that is, the right of the United States to be the first purchaser from the Indian tribes. We have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains. They sell the lands to us by treaty, and they sell the lands as the sovereign Power owning, holding, and occupying the lands.

But it is useless, it seems to me, Mr.

President, to enlarge further upon the question of the real political power of Indians or of Indian tribes. Our legislation has always recognized them as sovereign Powers. The Indian who is still connected by his tribal relation with the government of his tribe is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal. I believe that has been the uniform course of decision on that subject. The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe."

Mr. FESSENDEN. "Within the territory."

Mr. HOWARD. "Yes, sir. Why? Because the jurisdiction of the nation intervenes and ousts what would otherwise be perhaps a right of jurisdiction of the United States. But the great objection to the amendment is that it is an unconscious attempt on the part of my friend

from Wisconsin to naturalize all the Indians within the limits of the United States. I do not agree to that. I am not quite so liberal in my views. I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow citizens and go to the polls and vote with me and hold lands and deal in every other way that a citizen of the United States has a right to do."

Mr. DOOLITTLE. "Mr. President, the Senator from Michigan declares his purpose to be not to include these Indians within the constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them; and the question between us as whether his language includes them and mine excludes them, or whether his language excludes them and mine includes them. The Senator says in the first place, if the words which are suggested by me, "Indians not taxes" are to

govern any State , has it in its power to naturalize the Indian tribes within its limits and bring them in as citizens. Can a State tax them unless they are subject to the State. Certainly not my friend from Michigan will not contend that an Indian can be taxed if he is not subject to the State or to the United States, and yet, if they are subject to the jurisdiction of the United States they are declared by the very language of his amendment to be citizens.

Now, sir, the words which I have used are borrowed from the Constitution as it stands—the Constitution adopted by our fathers. We have lived under it for seventy years; and these words, "Indian not taxed," are the very words which were used by our fathers in forming the Constitution as descriptive of a certain class of Indians which should not be enumerated as a part of our population; as distinguished from another class which should be enumerated as a part of our population; and these words of

description used by them under which we have acted for seventy years and more. They have come to have a meaning that is understood as descriptive of a certain class of Indians that may be enumerated within our population as a part of the citizens of the United States, to constitute a part of the basis of the political power of the United States and others not included within it are to be excluded from that basis. The courts of the United States have had occasion to speak on this subject and from time to time they are "subject to the jurisdiction" of the United States. Why, sir, what does it mean when you say that a people are subject to the jurisdiction of the United States? Subject, first, to its military power; second, subject to its political power; third, subject to its legislative power; and who doubts our legislative power over the reservations upon which these Indians are settled? Speaking upon that subject, I have to say that one of the most distinguished men who ever sat in this body,

certainly that have sat in this body since I have been a member of it, the late Senator from Vermont Judge Collamer, time and again urged upon me as a member of the Committee on Indian Affairs, to bring forward a scheme of legislation by which we should pass laws and subject all the Indians in all the Territories of the United States to the legislation of Congress direct. The Senator from Ohio not now in his seat [Mr. Sherman] has contended for the same thing, and other members of Congress contend that the very best policy of dealing with the Indian tribes is to subject them at once to our legislative power and jurisdiction. "Subject of the United State!" Why, sir, they are completely our subjects, completely in our power. We hold them as our wards. They are living upon our bounty.

Mr. President, there is one thing that I doubt not Senators must have forgotten. In all those vast territories which we acquired from

Mexico, we took the sovereignty and the jurisdiction of the soil and the country from Mexico; just as Mexico herself had held it, just as Spain had held it before the Mexican republic was established; and what was the power that was held by Spain and by Mexico over the Indian tribes? They did not recognize even the possessory title of an Indian in one foot of the jurisdiction of those territories. In reference to the Indians of California, we have never admitted that they had sufficient jurisdiction over any part of its soil to make a treaty with them. The Senate of the United States expressly refused to make treaties with the Indians of California, on the ground that they had no title and no jurisdiction whatever in the soil; they were absolutely subject to the authority of the United States, which we derived from our treaty with Mexico.

The opinion of Attorney General Cushing, one of the ablest men who has ever occupied the position of Attorney General, has been read

here, in which he states clearly that the Indians, though born upon our soil, owing as allegiance, are not citizens, they are our subjects, and that is the very word which is used in this amendment proposed to the Constitution of the United States, declaring that if they be "subject" to our jurisdiction, born on our soil, they are ipso facto, citizens of the United States.

Mr. President, the celebrated civil rights bill which has been passed during the present Congress, which was the forerunner of this constitutional amendment, and to give validity to which this constitutional amendment is brought forward, and which without this constitutional amendment to enforce it has no validity so far as this question is concerned, used the following language:

"That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared

to be citizens of the United State."

Why should this language criticized any more now, when it is brought forward here in this constitutional amendment, than when it was in the civil rights bill? Why should the language be more criticized here than it is in the second section of this constitutional amendment, where the same words are used? The second section, in apportioning representation, proposes to count the whole number of persons in each State, "excluding Indians not taxed." Why not insert those words in the first section as well as in the civil rights bill? The civil rights bill undertook to do this same thing. It undertook to declare that "all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States. But, sir, the committee of fifteen, fearing that this declaration by Congress was without validity unless a constitutional amendment should be brought forward to enforce

it, have thought proper to report this amendment."

Mr. FESSENDEN. "I want to say to the honorable Senator, who has a great regard for truth, that he is drawing entirely upon his imagination. There is not one word of correctness in all that he is saying, not a particle, not a scintilla, not the beginning of truth."

Mr. DOOLITTLE. "I take a little issue with my friend from Maine on that point as a question of fact."

Mr. FESSENDEN. "In the first place, this was not brought forward by the committee of fifteen at all."

Mr. DOOLITTLE. "This proposition was first introduced into the House by a gentleman from Ohio by the name of BINGHAM."

Mr. FESSENDEN. "I thought the Senator was speaking of this first part of the action, the amendment, not the whole..."

Mr. FESSENDEN. "I do not choose that the Senator shall get off from the issue be presented. I meet him right there on the very issue. If he wants my opinion upon other questions, he can ask it afterward. He was saying that the committee of fifteen brought this proposition forward for a specific object."

Mr. DOOLITTLE. "I said the committee of fifteen brought it forward because they had doubts as to the constitutional power of Congress to pass the civil rights bill."

Mr. FESSENDEN. "Exactly, and I shall reply, that if they had doubts, no such doubts were stated in the committee of fifteen, and the matter was not put on that ground at all. There was no question raised about the civil rights bill."

Mr. DOOLITTLE. "Then I put the question to the Senators, if there are no doubts why amend the Constitution on that subject?"

Mr. FESSENDEN. "That question the Senator may answer to suit himself. It has no reference

to the civil rights bill."

Mr. DOOLITTLE. "That does not meet the case at all. If my friend maintains that at this moment the Constitution of the United States without amendment, gives all the power you ask, why do you put this new amendment into it on that subject?"

Mr. HOWARD. "If the Senator from Wisconsin wishes an answer, I will give him one such as I am able to give."

Mr. DOOLITTLE. "I was asking the Senator from Maine."

Mr. HOWARD. "I was a member of the same committee, and the Senator's observations apply to me equally with the Senator from Maine. We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill because the legislative power of such gentlemen..."

Mr. HOWARD. "I will not be forced by the Senator into a false position."

Mr. DOOLITTLE. "I do not desire to be interrupted until I finish one sentence. I say to that Senator that so far as the rights of the freedmen are concerned, I am willing to compare my course of action in this body or elsewhere with his. I say to that Senator that I labored as hard as he has labored to secure the rights and liberties of the freedmen, to emancipate the slaves of the South, and to put an end forever not only to slavery, but to the aristocracy that was founded upon it; and I have never, by word or deed, said or done anything, as a member of this body or elsewhere, tending to build up any oppression against the freedmen, tending to destroy any of their rights. I say to that honorable Senator, and I am ready at any time to meet him in argument upon it although it is drawing me now from the question in dispute, that I myself prepared and introduced here and urged bill whose provisions defended every right of the freedmen just as much as the bill to which we have now made reference, and I am

prepared to do so and to defend their rights with the whole power of the Government.

But, sir, the Senator has drawn me off from the immediate question before the Senate. The immediate question is, whether the language which he uses, "all persons subject to the jurisdiction of the United States," includes these Indians. I maintain that it does; and, therefore, for the purpose of relieving it from any doubt, for the purpose of excluding this class of persons as they are, in my judgment, utterly unfit to be citizens of the United States. I have proposed this amendment, which I borrow from the Constitution as it stands, which the fathers adopted more than seventy years ago, which I find also in the civil rights bill which passed this present Congress, and which I find also in the second section of this constitutional amendment when applied to the enumeration of the inhabitants of the States. I insist that it is just, proper in every way, but

reasonable, that we exclude the wild Indians from being regarded or held as citizens of the United States."

Mr. WILLIAMS. "I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. the first and second section of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word "citizens" as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. Section one provides that -

All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

If there be any doubt about the meaning of that paragraph. I think that doubt is entirely

removed by the second section, for by the second section of this constitutional amendment Indians not taxed are not counted at all in the basis of representation. The words in the second section are as follows:

Representatives shall be apportioned among the several States which may be included within the Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

They are not to be regarded as persons to be counted under any circumstances. Indians not taxed are not even entitled to be counted as persons in the basis of representation under any circumstances; and then the section provides.

But whenever, in any State, the elective franchise shall be denied to any portion of its male inhabitants, being citizens of the United States, etc.

Now, can any reasonable man conclude that the word "citizen" there applies to Indians not

taxed, or includes Indians not taxed, when they are expressly excluded from the basis of representation and cannot even be taken into the enumeration of persons upon whom representation it to be based? I think it is perfectly clear, when you put the first and second sections together, thus Indians not taxed are excluded from the term "citizens;" because it cannot be supposed for one moment that the term "citizens", as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis of representation. I therefore think that the amendment of the Senator from Wisconsin is clearly unnecessary. I do not believe that "Indians not taxed" are included, and I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subjects to the jurisdiction of the United States.

In one sense, all persons born within the geographical limits of the United States are

subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United State in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect; and so with these Indians. All persons living within a judicial district may be said, in one sense, to be subject to the jurisdiction of the court in that district, but they are not in every sense subject to the jurisdiction of the court until they are brought by proper process, within the reach of the power of the court. I understand the words here, "subject to the jurisdiction of the United States," to mean fully and completely subject to the jurisdiction of the United

States. If there was any doubt as to the meaning of those words. I think that doubt is entirely removed and explained by the words in the subsequent section; and believing that in any court or by any intelligent person, these two sections would be construed not to include Indians not taxed, I do not think the amendment is necessary."

Mr. SAULSBURY. "I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that Negroes shall be citizens of the United States. There can be no other object in it. I presume, than a further extension of the legislative kindness and beneficence of Congress toward that class of people,

"The poor Indian, whose untutored mind.
Sees God in clouds, or hears him in the
wind."

was not thought of. I say this not meaning it to be any reflection upon the honorable committee who reported the amendment, because for all the gentlemen composing it I have a high

respect personally; but that is evidently the object. I have no doubt myself of the correctness of the position, as a question of law, taken by the honorable Senator from Wisconsin; but if I feel disposed to vote against his amendment, because if these Negroes are to be made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens. If our citizens are to be increased in this wholesale manner, I cannot turn my back upon that persecuted race, among whom are many intelligent, educated men, and embrace as fellow-citizens the Negro race. I therefore, as at present advised, for the reasons I have given, shall vote against the proposition of my friend from Wisconsin, although I believe, as a matter of law, that his statements are correct."

The PRESIDENT pro tempore. "The question is on the amendment of the Senator from Wisconsin to the amendment proposed by the Senator from

Michigan."

Mr. DOOLITTLE. "I ask for the yeas and nays on that question."

The yeas and nays were ordered.

Mr. VAN WINKLE. "I desire to have the amendment to the amendment read."

The Secretary read the amendment to the amendment, which was to insert after the word "thereof" in the amendment the word "excluding Indians not taxed;" so that the amendment, if amended, would read:

"All persons born in the United States, and subject to the jurisdiction thereof, excluding Indians not taxed, are citizens of the United States and of the State wherein they reside."

The question being taken by yeas and nays, resulted - yeas 10, nays 30; as follows:

YEAS - Messrs. Buckalew, Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Norton, and Riddle - 10.

NAYS - Messrs. Anthony, Clark, Conners,

Cragin, Croswell, Elmuds, Fessenden, Foster, Geimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Kansas, Morgan, Morrill, Nyo. Poland, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Trumbull, Van Winkle, Wade, Willey, Williams, and Wilson -30

ABSENT - Messrs. Brown, Chandler, Dixon, Lane of Indiana, Nesmith, Saulsbury, Soraguc, Wright, and Yates - 9

So the amendment to the amendment was rejected.

The PRESIDENT pro tempore. "The question now is on the amendment of the Senator from Michigan."

The amendment was agreed to.

The PRESIDENT pro tempore. "The next amendment proposed by the Senator from Michigan [Mr. Howard] will be read."

The Secretary read the amendment, which was in section two, line twenty-two, after the word "male," to strike out the word "citizens" and

insert "inhabitants, being citizens of the United States;" so as to make the section read:

"Sec 2. Representatives shall be apportioned among the several States which may be included within the Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State the elective franchise shall be denied to any portion of its male inhabitants, being citizens of the United States, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age."

Mr. JOHNSON. "Is it supposed that that amendment changes the section as it was before? It appears to me to be the same as it was before, because, although the word "inhabitants"

is used, it is in connection with the other words that they are to be citizens of the United States. As it originally stood it read:

But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens."

Mr. FESSENDEN. "The object is the same as in the amendment already made, to prevent a State from saying that although a person is a citizen of the United States he is not a citizen of the State."

Mr. HOWARD. "The object is to make section two conform to section one to make them harmonize."

Mr. JOHNSON. "I am satisfied."

The amendment was agreed to.

Mr. SAULSBURY. "Is it in order now to offer an amendment to the first section?"

The PRESIDENT pro tempore. "There are several more amendments before the Senate, offered by the Senator from Michigan. [Mr. Howard] not yet acted upon. The next amendment

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offered by him will read."

The Secretary read the amendment, which was to add at the end of section two the words "in such State."

The amendment was agreed to....

APPENDIX C

STIPULATION WITH EXHIBIT 2-B-
"SILAS V. CROSS AFFIDAVIT BEFORE
U.S. TAX COURT AND U.S. COURT OF APPEALS.

SILAS V. CROSS and MILLIE)	
CROSS and SILAS A. CROSS and	)	COMBINED DOCKET
FRANCINE CROSS,	)	NOS.: 11879-78
	)	and 11880-78
Petitioners,)	
)	
vs.)	
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	
)	
Respondent.)	
-----)	

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purposes of this case, the following facts and exhibits attached hereto and made a part hereof, may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this Stipulation.

1. At the time the Petition herein was filed, and at all times relevant to this case, Petitioner, SILAS V. CROSS was married to MILLIE

CROSS, and both resided within the borders of Tacoma, Pierce County, Washington. Petitioner, SILAS A. CROSS was at the time the Petition herein was filed, and at all times relevant married to FRANCINE CROSS, and both resided within the borders of Tacoma, Pierce County, Washington. All Petitioners resided at all times relevant, within the original boundaries of the Puyallup Indian Reservation.

2. Petitioners, SILAS V. CROSS and SILAS A. CROSS are father and son and both are enrolled members of the Puyallup Indian Nation. Petitioner SILAS V. CROSS is the beneficial owner of land located within the original boundaries of the Puyallup Indian Reservation, which land is held in trust by the United States of America for his benefit, and upon which land is located a retail smoke shop business. The profits from the above referenced smoke shop are the subject of this Petition. Attached hereto as Joint Exhibit 1-A is a copy of the Statutory

Deed showing Petitioner, SILAS V. CROSS' beneficial ownership of the trust land in question. Attached as Joint Exhibit 2-B listing is a copy of an Affidavit showing Petitioner, Silas V. Cross as an enrolled member of the Puyallup Tribe.

3. The original patent and authority granting ownership of the land in question was issued to petitioner's grandfather, JIMMY CROSS, by authority of the Medicine Creek Treaty, insofar as it adopted the sixth clause of the Treaty with the Omahas. By that authority the patent was issued to JIMMY CROSS on January 30, 1886, by then President Grover Cleveland. Attached hereto as Joint Exhibit 3-C and Joint Exhibit 4-D, respectively, are copies of the Medicine Creek Treaty and the original patent to JIMMY CROSS establishing his beneficial ownership in the land in question.

4. Petitioner SILAS V. CROSS, his father and mother, his grandfather, and his son, have all resided on the original land allotted by

authority of the Medicine Creek Treaty, as originally vested in favor of Petitioner's grandfather in 1886.

5. For the year 1976, Petitioner SILAS V. CROSS and MILLIE CROSS filed joint U.S. Individual Income Tax Return (Form 1040) a copy of which is attached as Joint Exhibit 5-E, and Petitioners SILAS A. CROSS and FRANCINE CROSS filed a joint U.S. Individual Income Tax Return (Form 1040A) a copy of which is attached as Joint Exhibit 6-F. Petitioners failed to report on their income tax returns the income generated through operation of the smoke shop business on the above-referenced trust land.

6. Statutory notices of deficiency for 1976 were sent to Petitioners by certified mail on the 11th day of August, 1978. Copies of the notices of deficiency for 1976 sent to Silas V. and Millie Cross and Silas A. and Francine Cross are attached hereto as Joint Exhibit 7-G and 8-H, respectively.

7. The net profit received by Silas V. Cross in 1976 from the sale of cigarettes and tobacco products at Cross' Smoke Shop was \$41,687.00, in addition to the other income shown on the form 1040 filed by Silas V. Cross and Millie Cross for 1976. Silas A. Cross received \$1,899.00 in wages from working at Cross' Smoke Shop in 1976 in addition to the other income shown on the form 1040(A) filed by Silas A. Cross and Francine Cross in 1976. Neither Silas V. Cross nor Silas A. Cross concede that such income is subject to federal income taxation.

8. All of the income from cigarette sales determined by Respondent in this case resulted from the operation by petitioners of a retail store that sold cigarettes and other tobacco products and merchandise. The smoke shop income was not reported by Petitioners for federal income tax purposes for 1976.

9. The real property upon which The Cross Smoke Shop is located is comprised of .62 acres

in Pierce County, Washington. That property represents a fraction of the original patent allotment made to JIMMY CROSS in 1886.

10. The fair rental value of the real property referenced above was \$6,500.00 for the year 1976. This value is based upon rental of the property for use in the operation of a smoke shop or other similar commercial enterprise, which represents the highest and best use of the subject property. This value is not based upon its rental for use in whole or in part for any agricultural or mineral related enterprises.

11. Petitioners are not liable for the addition to the tax under I.R.C. 6653(a) for 1976.

DATED: January 26, 1984

UNITED STATES TAX COURT

SILAS V. CROSS and
MILLIE CROSS, husband and
wife,

Petitioners,

vs.

)
) DOCKET NO. 11880-78
)
) AFFIDAVIT OF
) SILAS V. CROSS
) (Kwul-wout)
)
)

COMMISSIONER OF INTERNAL)
REVENUE,)

Respondent.)

-----)
(PUYALLUP RESERVE))
STATE OF WASHINGTON)
COUNTY OF PIERCE) ss.

I, Silas V. Cross (Kwul-wout) being first
duly sworn on oath, depose and say:

I.

That I reside within the boundaries of the
Puyallup Indian Reserve or "Reservation" on
original allotted lands held in trust by the
United States. My local address is 7522 Valley
Avenue, East, Puyallup, Washington.

II.

That my Puyallup name is Kwul-wout. I was
born and still live on my Grandfather's
allotment No. 69 on the Puyallup Reserve or
"Reservation". My father's name is Silas Cross,
his Puyallup name is Kote-Hough. He served as
Chairman of the Puyallup Business Committee from

1928 to 1936. My Grandfather's name is Jimmie Cross, his Puyallup name is pak-aw-wa-tish, and Ka-Loose, is his nickname. My mother's name is Hattie Cross, her Puyallup name is Chee-at-sa.

III.

That I am an enrolled member of the Puyallup Tribe and have been all my life. I declare that I have never consented to being a citizen of the United States and hereby proclaim my non-citizenship in the peoples of the United States. However, by reason of the Medicine Creek Treaty of 1854 I am dependent upon the government of the United States for the protection of my treaty related rights from the State of Washington interferences and depredations. I am living in tribal relations, my enrollment number is 50 on the 1929 roll. I have never authorized any person to take me out of said tribal relations, nor has the U.S. Government authorized any person or agency to do so.

IV.

That I was born on November 2, 1918, on the lands of the Puyallup. That I have served as a member of the Tribal Council from 1954 to 1972, and have for many decades made myself knowledgeable in all matters relating to tribal affairs to the furthest extent possible for me to do so. That I have always all of my life with the exception of Army service during World War II resided upon my family's allotted lands within the Puyallup Reserve. I actively served in the Philippines during World War II in the U.S. Army, however, I was never prompted to do so out of patriotism or any duty owing the United States or the State of Washington particularly the latter which has always been our deadliest enemy, but did so to share in my white neighbors' perpetual problem of animosity on a world-wide scale. I believed that it would be better for me and my family, i.e., we would receive better treatment if I did this. This is the only reason. I regard this imposition of

military duty as a form of coercion in violation of my treaty rights and status and the basis for a substantial claim against the U.S. Government.

V.

That I have been seriously studying Indian law and its application for over twenty-five years. That in fact it was my initial effort based on reading Federal Indian Law that began the whole process leading to the establishment of our Treaty rights to fish both on and off the Reservation as we did in 1854 free of state genocidal regulations. Eventually this struggle both legal and political after much suffering and incaluable injustices resulted in the "Judge Bolt" decision. United States on relation of Certain Tribes v. State of Washington, 384, F. Supp 312 (1974), Upheld on appeal in 443 U.S. 658 (1979).

The Puyallups prior to and at the time of 1854 and since have been heavily engaged in trade, therefore this was a right previously

exercised and must be a right therefore not given up, therefore reserved, unless there is treaty language taking said right away. There is not of course! U.S. v. Winans, 198 U.S. 371 (1905). The famous "Judge Bolt" decision itself expressly recognizes the Puyallups' extensive trading activities wherein at page 406 of said opinion cited supra the Court held:

"They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers.... They cured and dried large quantities for year around use, both for themselves and others through sale, trade, barter, and employment." (Emphasis added)

At page 351, Judge Boldt's unquestioned findings regarding trade activities of the Puyallups in general is stated:

"At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographical area...in addition to potlatching, which is a system of exchange between communities in a social context often typefied by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and

for export as well as to provide money for purchases of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area." (Emphasis added)

For a truly learned explanation of Puyallup tribe early tobacco trade see the Affidavit of Barbara Lane, Ph.D., attached to Memorandum of Authorities as Specimen "B".

VI.

That also, Judge Boldt said at page 407 of his decision:

"...the mere passage of time has not eroded, and cannot erode the right guaranteed by solemn treaties that both sides pledged on their honor to uphold." (Emphasis added).

My people the Puyallups have always from time immemorial been traders as well as fishermen. We have always traded in many articles, including but not limited to varieties of processed and unprocessed fish. Both with other tribes and so called white settlers and their descendants either of the English or American variety within the past 200 years; before that

with Chinese and other peoples who came to the Northwest for one purpose or another in pre-Columbian days. We have traded articles used as tools. We have traded many food items and our trade has included many organic substances such as "Chit'um" used as a laxative, ferns and other substances the white settlers and others wanted. When I was only 16 years old I regularly peeled "Chit'um bark so my mother could trade it with "white folks" in the Puyallup Valley.

It was common knowledge among Northwest Indian people when I was growing up that the word "Kin-nik-in-nik" was an organic substance that grew along certain bay sides and was mixed with other tobacco and sold to all peoples who wanted it in the area. My mother told me not to smoke it because it would make me sick; and she knew it wasn't good for my health. It was usually mixed with some other kind of tobacco, because it would be too strong to use otherwise. The kinds of trade we Puyallups

engaged in were many. My Grandfather Ka-Loose by nickname was a horse trader of great repute, his horses were used in horse races as far away as Montana. I was quite "horse crazy" when I was young, and remember many horses being pastured and stabled on my grandfather's lands some belonged to persons just traveling through the area. He made so much money in trading activities that he was known within the Tribe as a "Tin God".

VII.

That I am thoroughly familiar with all the oral traditions of my Tribe and nation, having learned these over my entire life time. I am also thoroughly familiar with Governor Steven's and his staff assistants' writings of the crucial time herein 1854-1856. In this connection I have always exercised full access to the tribal archives maintained by us and reviewed for years all papers and documents therein pertaining to the affairs of the

Puyallups. Certain promises made by Governor Stevens which are available in writing are part of the oral traditions of my people. My people understood them as they do now that the treaty agent (Governor Stevens) promised they would not only continue to trade but that there would be opportunities for increased trade because of the numbers of white persons anticipated to come into our territory. However, it has always been understood by the Puyallups that we could not trade outside the dominions of the United States.

In the letter transmitting the Treaty of Medicine Creek, which has just been concluded, Stevens explained the Treaty provision in his letter to the Commission:

"The Indians on Puget Sound have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. They form a very considerable proportion of the Trade of the Sound... They catch most of the fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." (Emphasis added)

In the treaty negotiations Stevens specifically assured us that we would be able to continue to trade with the settlers. Referring to the increased opportunities offered in the treaty, Stevens said:

"Now there used to be twice as many Indians...and they could not sell salmon, oysters and cranberries to the settlers for there were none. Well, you can now not only sell these things but you will besides be furnished yearly with clothing."

There was only one limitation on that trade discussed. George Gibbs, a lawyer-ethnologist, who assisted Stevens and drafted the treaties in western Washington, reported earlier in 1854 on the considerable Indian trade with Vancouver Island and recommended that when treaties were made the Indians should agree to restrict their trading to American territory. (From the affidavit of Dr. Barbara Lane at page 4).

"The Clallams, as well as the Makahs and some other tribes, carry on a considerable trade

with Vancouver's Island, selling their skins, oils, etc., and bringing blankets in return. At present it is hardly worthwhile to check this traffic, even if it were possible; but when the white population increases it may become necessary as a revenue measure. In any treaties made with them, it should enter as a stipulation that they should confine their trade to the American side".

It has always been a major part of our oral tradition regarding trade that we had to feed the early white man and show him how to survive here. Also that we did the logging, we did the fishing, we did farming, we taught the skills necessary to survive here, and in doing so we traded in all manner of goods including various tobaccos.

My forefathers had an unwritten language and handed down their history verbally as I now tell all I know to my grandson David or Kwulwout. According to our oral traditions many

goods moved from here to the territory of Yakimas and then beyond by appropriate trails through the mountains. Tobacco came and went with many other goods this way since time immemorial. Also our goods came and went southerly into Chinook Country and Northwesternly into the lands of the Makah, Lummi and Alaskans, Westernly into Quinault Country and Northernly into Duwamish Country. We created many useful items by our own manufactory. My own mother sold chicken eggs, and salmon. We would always sell anything we could get a hold of and had for all time done so. My father made and traded beer in the late 20's and early 30's for chickens, food, tobacco and money, etc.

That my maternal great-grandmother, (Chee-At-Sa) was a Yakima-Puyallup of full blood and she lived all her life on the Puyallup reserve, but when the government insisted that she take an allotment in reservation land in the late 1880's she became angry, took a canoe and went

to a Puyallup village located at Minter Creek across the bay and stayed there until she died. My grandmother (her daughter) Alice Hawk married Henry Allen a Clallam of the full blood. Every year in the summer months after school was out, in a large sized boat called a "barge" within the family circle, the whole family rode the tides from the mouth of the Skokomish River in Hood's Canal north into the Coastal Country of the Clallams and the Makahs. In the process there was always considerable selective fishing as the "barge" went accompanied by considerable trading for anything they could exchange the fish they caught for. Furthermore in order to promote and enhance the trading activities associated with the family "barge" the family did, during the late fall, winter, and early spring months, gather various items that would be tradable as anticipated selling situations along the fish route developed during the season. For example furs, skins, smoked salmon,

tobaccos, dried berries et cetera were gathered, bargained for, stored, prepared, packaged as appropriate, et cetera. Then there were traded in actuality along with other items acquired along the way through barter, sales, and exchanges. I do my trading much the same way as my grandfather and grandmother and their ancestors before them except in my case I do not travel any particular trade route. I am located in a fixed position just as many of my other ancestors were as well, particularly those who were operating in this lower Puget Sound trading hub area, with trading routes running Southeasternly (Yakimas), Southwesternly (Chelalis and Chinook), Northernly (Duwamish, etc.), Northwesternly (Clallams, Makah, Alaskans etc) Westernly (Quinault, Quillaiute etc) In all instances since the advent of foreign peoples: Europeans, Chinese and others, from time immemorial, we have traded extensively and have accumulated wealth from the income or the profit increments thereof.

My Uncle Joe Allen was given the Indian name Kwee-Dik which is an original Quinault name but was given to my Uncle because of trade associations with the Quinaults.

It is well known fact that Tribes and bands from Vancouver Island near the turn of the century came here by canoe to pick hops for cash and brought numerous trade articles with them to trade for other items with Puyallup traders. They in fact brought a very popular bread called "Lup-A-Skwee" and seal skins for drums among other items when they came. I presently possess a sealskin drum which is older than I am which my father left me.

My Mother's potlatch dancing dress was lined with row after row of dentilium shells which means it had to have come from the Makah Country for sure.

VIII.

That I personally read the affidavit of Barbara Lane, Ph.D Anth opologist and know

personally that her observations and findings are entirely consistent with the oral traditions and history of my people. I also know that her findings given as expert testimony in the "Judge Boldt" fishing case were highly regarded by said Federal Judge and reported by him as controlling. Judge Boldt went so far as to hold at page 350 of said decision that:

"Dr. Lane's opinions, inferences, and conclusions based upon the information stated in detail and well documented in her reports, appeared to the court to be well taken, sound and reasonable. In summary, the court finds that where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified."

IX.

That it has always been the understanding of myself and my people - the Puyallups as well as Governor Stevens and his party and the early settlers that our trading activities were reserved and protected by the Medicine Creek Treaty and indeed we were, if anything governmentally induced to expand these

activities to meet the demands of the ever growing white population. It was not until the 1970's that State depredations upon our trading was begun. In the two decades before that the State had apparently directed its available legal energies into attempting to destroy our treaty fishing rights and related tribal culture and identity. It was not until the mid-1970's that an aggressive Income Tax collection process was directed against us as well by the United States Internal Revenue Service.

X.

That presently in like manner and like custom of my immediate and remote ancestors I trade in many articles and make my living accordingly. This trade is based on my tribe's reserved right to do so. The articles I trade in (the first of which I hand manufacture) are:

1. Pow-wow drums made to ancient specifications and often stretched with similar materials such as deer skin. I

trade these items with individuals belonging to tribes in the whole of the west on a fairly large scale.

2. I am a fisherman and I both sell and trade my seasonal net catches.
3. Recently with a Bureau approved tribal code for liquor sales I sell beer and other liquor.
4. I buy, trade, barter, and sell bead work with leather items, as well as wearing garments and other bead work.
5. I buy, trade, barter and sell Indian hand manufactured woolen sweaters and caps.
6. I trade in tobacco products and numerous miscellaneous goods.

I do all the foregoing manufactory and trading on my own trust land.

XI.

That it was always understood by me based upon my growing up within the Puyallup

Reservation and on trust lands previously allotted to my family; and mainly because of life long discussion and listening in particular to my Grandfather, Father and my Mother speak over the years, that our way of life was to be one of freedom from taxes of any kind, or subjection to any state regulations for any purposes. I personally know that the State of Washington and its citizens made no effort whatsoever until the late 1970's to require the Puyallups in connection with our rather extensive trading rights to submit to any tax collection imposition. It was always understood and appreciated that we were free of the "white-man's" red tape which we believed he invented to enslave himself and others.

That I personally know that my great Grandfather, Grandfather, Father, myself, and many other Puyallups traded extensively from treaty time to the late 1970's without the U.S. Government ever asserting an income tax requirement upon our trading profits.

XII.

That I have always understood that the oral traditions of the Puyallup tribe clearly manifest and "spell-out" that it was not Governor Stevens (treaty agent) intentions to either tax us on any of our various activities as of then into the future. Just as importantly my tribal representatives and my people of 1854 (and to the present) have likewise always understood that our main character with respect to the surrounding white population was that so long as we lived in tribal relations we could not and would not be under the white-man's state or United States regulations, except to legally implement treaty provisions as these were well understood in scope and extent by all concerned as of 1854.

The United States Internal Revenue Service has no right under said treaty to revise the treaty's terms unilaterally from generation to generation even going so far as into the fourth

generation as here because it currently for some reason sees fit to do so. No fair construction of the Internal Revenue Code allows for any supposition that Congress ever intended to impose income taxes upon Treaty Indians living in tribal relations whose income was derived from exercising Treaty protected and guaranteed rights as well as from trust land activities.

That it is clear that at the time of the Medicine Creek Treaty - 1854 based on the strong oral traditions and history of the Puyallups (including both upper (Scope-am-mish) and lower (Chuck-al-loots) that the tribes in the area were both numerically and militarily superior to the American forces in the area. Therefore had U.S. government taxes of any kind been sought to be imposed upon any of our regular and usual profit making activities especially trading it would not and could not have been tolerated or agreed to in anyway.

XIII.

That we were even taught in Indian School

conducted by the U.S. Bureau of Indian Affairs that we were free of all state laws and regulations and especially taxes as well as U.S. taxes, and business regulations.

In fact the U.S. Interior Department's, Bureau of Indian Affairs Branch of Education published a book (copy contained in tribal archives) in 1945 entitled "Indians of the Pacific Northwest", by Ruth Underhill Ph.D. This publication is a very informative childrens level book which discusses material pointedly based upon not only the oral tradition of this tribe but actual history of that U.S. Agency dealing with Indian affairs of all kinds. Very important at page 208 thereof it is recorded:

"BY 1855 THERE WERE 30,000 WHITES IN WASHINGTON AND OREGON. OREGON HAD TERRITORIAL GOVERNMENT IN 1848. WASHINGTON IN 1853. IN 1854 WORD WENT OUT TO THE GOVERNORS OF BOTH TERRITORIES THAT INDIAN RIGHTS MUST BE BOUGHT OUT. INDIANS MUST CHOOSE SOME PART OF THEIR

TERRITORY WHERE THEY WOULD REMAIN FREE OF
TAXES. THE REST OF the COUNTRY WOULD BE THROWN
OPEN TO SETTLEMENT.

IT SOUNDS CRUEL. YET WE MIGHT REMEMBER
THAT, IN THE DAYS WHEN THIS WAS FIRST DONE, FEW
OTHER NATIONS HAD THOUGHT OF SETTING ASIDE A
HOME FOR CONQUERED PEOPLE." (Emphasis added)

XIV.

I am a treaty Indian and I am dependent
upon the United States Government only for
protection and regulation as authorized by
treaty. The United States by the Courts or
otherwise may not subject me against my will to
the regulation and enforcement practices of my
truly deadliest enemy of all time--the government
of the territory of Washington, now the State of
Washington without grossly violating
International law. I further declare: I am no
part of the State of Washington or its people
because under the federal and state government's
Constitution I am not by the direct terms of
each counted in their rules of determining the

Constitutional representatives of their people. I am in both Constitutions outside their peoples instead designated as one of the "Indians not taxed." I have a special status under the Law of the United States - that is under that law I am a Treaty Indian and everything that this government or its State does concerning me is governed by the Medicine Creek Treaty of 1854 (10 Stat. 1132) which is Supreme law of the land. Article VI. U.S. Constitution.

XV.

That the Puyallup Tribe's Constitution and By laws are authorized by the Indian Reorganization Act and have since 1970 been approved by the Secretary of the Interior. The Puyallup Tribe has never rejected said I.R.A. obviously. This Act recognizes and even promotes as a matter of high Congressional Policy tribal sovereignty (Home Rule) 48 Stat. 984, preamble and Sections 10, 16, 17, & 18. June 18, 1932.

XVI.

That additionally in so far as both fishing and trading activities are concerned I am only exercising that right which Governor Stevens actually encouraged my direct family ancestors to keep engaging in and which they understood was their God given right since time immemorial, and the only limitation or imposition that was to be placed on it was that contained in Article 12 of the treaty. That all the time I was growing up it was drilled in to me that we the Puyallups could fish, hunt, gamble, trade, pick berries without restrictions of any kind upon us including imposition of income or any other taxes on profits from these treaty activities. Not until the late 1970's over 120 years after Medicine Creek Treaty became the Supreme law of the United States was there ever any assertion of income taxation authority over our treaty related income producing activities.

XVII.

That without a doubt the "power to tax is

the power to destroy". U.S. v. Ricker, 188 U.S. 432 (1903). I am very fearful of the present U.S. taxation policy and believe that the United States government means business to tax or imprison the Puyallup tribal members into full submission to its sovereignty. By Article 8 of the Medicine Creek Treaty of 1854 I am dependent upon the United States government for my safety and welfare as is my Tribe, therefore I am a ward of the U.S. Government. No certificate of competency has ever heretofore issued to either me or any of my direct ancestors. Presently, members of my immediate family are in federal prisons for the alleged commission of misdemeanors involving certain forms of gambling in Indian Country in flagrant violations of their rights as treaty Indians. We have gambled since time immemorial.

XVIII.

That I as well as every other Puyallup has a viable treaty status under the Medicine Creek

Treaty of 1854; further, that we agreed to become and in fact are dependent upon the government of the United States for the protection of all our reserved and agreed to rights. My life and the life of my tribe and its interests, including freedom from involuntary servitude and the free exercise of reserved trading rights under the treaty are as much in the "trust" of the United States as are our meager lands now occupied by us in trust with the United States.

XIX.

- That it is one of the important oral traditions and facts of all of my tribe that the State of Washington and some of its U.S. citizens with state support have over the years maintained destructive and hostile activities against the Puyallup Tribe, its people, its lands and interests such as fishing and not trading. That their activities have prevented myself and my tribe from advancing as a separate people and have imposed incalculable and fearful

damages upon us in body, mind and spirit. Our spirit for those of us still surviving a terrible insidious pogrom against us for over 120 years is bent but not broken. At one time the U.S. government after the "Territorial Indian Wars" in 1855-56 set aside over 29,000 acres for our free, exclusive use, and occupancy forever. Yet today after many tragic illegal schemes and depredations against us and our lands only about 150 acres scattered in parcels here and there throughout the reservation is in our actual use and occupancy. Much of our land reserved was lost by the threat of illegal land tax impositions and foreclosures. This in itself is a tragedy and injustice of the largest magnitude.

XX.

That in 1964 when our push was on to overcome the depressing effects of systematically denied rights to fish both on and off the reservation under the guise of state

regulation, I was very instrumental in spreading the word, and counseling with the pertinent people of the tribe on our clearly reserved right to on reservation unrestricted fishing; and expressly provided for unrestricted fishing at off reservation localities as guaranteed by fair interpretation of the Medicine Creek Treaty of 1854. After arrests, detentions, court cases of all kinds involving at least four separate successful appeals to the United States Supreme Court by the tribe, our fishing rights were finally recognized (although begrudgingly) as within the very obvious scope of the Medicine Creek Treaty of 1854.

XXI.

That a major incident with respect to the Puyallups' and other Sound tribes' fishing rights occurred on certain Puyallup property within the reservation in 1970. I was personally there during the time of an encampment of our people and their other Indian friends, and was along with all the others

subjected to much harassment, abuse, gasing and directly threatened violence by "cops" of the Tacoma Police Department and Game and Fisheries Department Officers. Many of us were illegally arrested and detained and later released because the state recognized after its illegal actions that it had no real legal jurisdiction to do what¹ it had done to us and our friends. At least 100 of us and our friends were hauled away in paddy wagons, buses and police sedans. Finally, the U.S. District Attorneys office stepped into the situation and the result was the famous "Judge Boldt" decision.

XXII.

That the following provisions taken from the "Universal Declaration of Human Rights" by the United Nations pertain to the United States governments efforts through the Internal Revenue Service to impose income taxes on my tribally sanctioned and maintained treaty-trading activities and rights. The preamble begins:

"WHEREAS, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

..."THE GENERAL ASSEMBLY proclaims - This Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society keeping this Declaration constantly in mind shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the people of territories under their jurisdiction.

(Emphasis added)

...

"Article 4. No one shall be held in

slavery or servitude:...Article 15. (1)
Everyone has a right to a nationality. (2)
No one shall be arbitrarily deprived of his
nationality... Article 17... (2) No one
shall arbitrarily be deprived of his
property." (Emphasis added)

Most importantly the "...GENERAL ASSEMBLY
proclaims [in Article 2 thereof] Everyone
is entitled to all the rights and freedoms
set forth in this Declaration, without
distinction of any kind, such as race,
color, sex, language, religion, political
or other opinion national, social origin,
property, birth or status. Furthermore, no
distinction shall be made on the basis of
the political, jurisdictional or
international status of the country or
territory to which a person belongs,
whether it be independent, trust, non-self-
governing or under any other limitation of
sovereignty."

That myself and the other Puyallup members consider that impositions and interferences upon our trading rights are an arbitrary taking of our property in violation of the U.N. Charter as well as a flagrant disregard of the U.S. Constitution.

Being in a condition of dependent - a ward of the United States not in anyway a constitutional member or citizen thereof, and being required to pay income taxes on income earned directly through my dependency status is a form of servitude which is forbidden. Also my right to a nationality is being directly assailed through the destructive power of taxation imposed upon my tribe's sovereignty and my rights, status, and interests therein.

XXIII.

In fact it is also an important part of our oral traditions that we, the Puyallups along with certain other tribes, like the Nisqually just south of us were deceived into signing the treaty with regard to the amount of land we

reserved and its location. The result was the war of 1855-56 which culminated in the Fox Island Conference of 1856 with Governor Stevens (U.S. Agent). We demanded and received six square miles encompassing the entirety of Commencement Bay as well as the Puyallup river delta and south to a considerable extent. Thereafter by appropriate executive order the reservation was expanded upon until at its peak it comprised 29,000 acres.

XXIV.

That neither myself nor any other Puyallups have ever received any offer or any sum of money for the threatened infringements upon our sacred, federally protected treaty rights to be free of all taxes of all kinds both State and Federal.

XXV.

That I am not a Constitutional Citizen of the United States can not be denied. I was born in 1918, six years before the 1924 Indian

Citizenship Act, which Act by its express terms excludes me from its obvious illegal scope. An Indian living in tribal relations can not constitutionally be made a U.S. citizen without appropriate Constitutional Amendment first. With respect to the General Allotment Act of 1887 prior to my birth I am not made an Unconstitutional (Statutory) citizen either. The General Allotment Act 24 Stat. 388, Feb. 8, 1887 provides in pertinent part: (Sec. 6 thereof).

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States... Without in any

manner impairing or otherwise affecting the
right of any such Indian to tribal or other
property." (Emphasis added)

XXVI.

That no certificate of competency has ever been applied for or issued to me, or to any of my direct forefathers.

XXVII.

That no negotiations have ever been entered into between the President of the United States and Puyallup Tribe for the consent of the tribe to U.S. Citizenship. Before this could be done however, the U.S. Constitution would have to be amended to remove therefrom the phrase "excluding Indians not taxed".

XXVII.

That from the oral traditions of my tribe I know about the Fox Island Conference of 1856 and the successful local war which was waged by my tribe and the Nisquallies in the 1855-1856

period immediately preceding this very important conference. Both the Puyallups and Nisquallies had been deceived into agreeing to retaining only small reserves on hilly land, and the outcome of the Fox Island Conference modified this condition greatly. The Nisquallies 1200 acre tract was increased to 8 square miles and the Puyallup 1200 acre tract was likewise increased but to 6 square miles. At this conference it was understood by representatives of the U.S. (Governor Isaac Stevens in particular and Puyallup tribal members that no taxation could or would ever be imposed upon the exercise of their reserved rights of fishing, trading, hunting and manufacturing, nor would the tribe ever seek to tax U.S. citizen's activities within their reserves either.

XXIX.

That there has been a continuity of tribal government from 1854 to the present time is beyond doubt. There has always been a subsisting viable Puyallup tribe and tribal

government from time immemorial.

My grandfather served as a tribal Judge in the late 1890's, my father served on the tribal business council in the late 1920's to 1936. I served on the tribal council for 18 years and my son is presently Vice-Chairman of the tribal council.

XXX.

That pursuant to the authority contained within the sixth article of the treaty with the Omahas as incorporated into the sixth article of the Medicine Creek Treaty of 1854, an instrument of allotment of permanent home was issued to my grandfather Jimmy Cross and his heirs by E.M. Marble Acting Commissioner of Indian Affairs on the 17th day of January 1881. This instrument stated:

"...the United States guarantees such possessions and will hold the title thereto in trust for the exclusive use and benefit of himself and his heirs so long as such occupancy shall continue."

Thereafter, on the 30th day of January 1886

my grandfather was issued a "certificate of allotment" or "Patent" or "Preliminary Patent" depending upon the choice of terminology used by President Grover Cleveland's office. This "Patent" was expressly referenced to the 6th Article of the treaty with the Omahas and is a direct application thereof. It was always my people's understanding that we were guaranteed a permanent home free of taxes forever so long as we occupied the permanent home land involved.

My direct forefathers and myself have always occupied the same land with this understanding. It was likewise understood that the lands my tribe ceded to the United States were so ceded to it forever too. However, no final patent or Patent in fee has ever been issued (the subject land being in continuous trust with the United States from 1881 to the present) to either Silas V. Cross, or any of his predecessors in interest and the subject land has been in continuous use and occupancy a permanent home, farm, and place of trade since

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before 1886 situated as it is well within the
Puyallup Reservation.

FURTHER AFFIANT SAYETH NAUGHT.

SILAS V. CROSS-----

DATED: November 14, 1981

I, BARBARA LANE, being first duly sworn on
oath, depose and say:

I have done extensive research on the culture and history of Native people in the northwestern part of North America. I was employed by the United States Department of Justice for several years as a consultant to

gather anthropology information concerning the treaties negotiated in 1854 and 1855 between the United States and the Indian tribes of Western Washington. I have testified as an expert witness in several court cases concerning the history and culture of Indian tribes in this area. For example, Judge Boldt relied on my testimony and presentations in United States v. Washington, commenting in particular at page 350 of volume 384 of Federal Supplement.

In the course of my research I have studied original source materials (writings of people who had direct contact and dealings with the Indians at the times in question) as well as secondary sources (writings of other anthropologists and historians). At the request of the Puyallup Tribe I investigated the available materials to report to them on the history of the Indian's involvement in trade and commerce, and the purpose of Article 12 of the Treaty of Medicine Creek and the parties'

understanding of that provision. This affidavit is a summary of my findings.

Trade has always been an integral part of the Indian economy in the Northwest. In aboriginal times, the Puyallup Tribe traded extensively both with Indians in their immediate vicinity and with tribes east of the mountains. After the arrival of the non-Indians, the Puyallups' trade expanded to include the non-Indians. By treaty times, as well as after the treaty was signed, Indian trade was vital to the economies of both the settlers and the Indians. The Puyallups, as well as other Indians, traded not only products they produced and processed in their own territories, but also goods which they imported from outside their territory and traded, as middlemen, to others.

Puyallup Indians had been engaged in systematic and continuous trade with non-Indians for over 20 years prior to the Treaty of Medicine Creek. Puyallups had been trading with the Hudson Bay Company since the establishment

of Fort Nisqually in 1833.

Puyallups traded a wide variety of products to both Indians and non-Indians. Those included fish, shellfish, berries, furs, duck feathers. Puyallups imported grasses which were used in making salmon seines and dip nets, duck nets, carrying straps and other items of Puyallup manufacture for which fiber string was used. One of the most important items supplied by Indians to non-Indians was oil to be used for lubrication and for lights. All moving parts in machinery (ships, grist mills, sawmills), as well as skid roads were lubricated with oil purchased from the Indians. The lamps used for domestic lighting as well as the lighthouse relied on oil processed by the Indians.

Tobacco was one of the items of Indian trade, both among themselves and with the non-Indians. Tobacco is one of a number of commercially important plants first domesticated by American Indians and now used throughout the

world. No other domesticated plant had so wide a geographic distribution in North America before the Europeans arrived.

Tobacco was used in a variety of ways by the Indians. It was chewed, taken as snuff, smoked in pipes, smoked as cigars wrapped in its own leaf, smoked cigarettes wrapped in leaves of other plants, burned as incense, and scattered as offerings. Tobacco was used as medicine, as a sacrifice, for ritual purposes, or for pleasure. Almost everywhere in native North America tobacco was highly valued and was believed to have special property and powers. Attitudes toward it ranged from respect to awe.

Although records on this subject are a bit sparse, at least some of the Indian tribes in northwestern North America grew various forms of tobacco. There are several accounts from non-Indian explorers and settlers describing cultivation and use of tobacco by various Indian tribes in this area. Although there is no record of whether or not tobacco was grown by

Indians in the area of the Puyallups, it is important to note that the word used for tobacco in the local languages appears to be a native word without any obvious non-Salish connection. If tobacco had been a recent introduction into the area, we might expect to find a composite or a borrowed name for it.

There is documentation of the use of tobacco by Puyallups. The extensive trade conducted by the Puyallups undoubtedly included trade of tobacco. the Twana (Skokomish) did not grow tobacco but obtained it in trade from groups at the southern end of Puget Sound. A missionary to the Skokomish specifically identified the Puyallups as one of the tribes engaged in trade with Skokomish. Further, the Puyallup valley was a trade center where Indians from various tribes gathered and traded a variety of items.

The wide distribution of tobacco and pipes is clear evidence of the importance of

aboriginal trade of those products. One of the species of tobacco grown and used in the northwest had its origin in California, and was found along the Oregon coast and the Willamette Valley, both of which were trade routes to the Northwest. It also was found along the middle Columbia and was grown in abundance along the Snake River, a major trade route from the plains across the plateau of the Northwest coast. From there, its distribution extended across the Rockies to Montana and Saskatchewan where it was grown by the Blackfoot, Crow and Sarcee.

The archeological record also shows evidence of trade items from the Northwest Coast in the upper Mississippi region and, conversely, items from the Great Lakes and Upper Missouri occur in the Northwest. Tobacco diffused eastward along this route to the headwaters of the Missouri where it met the tobacco of Eastern North American *Nicotina rustica*. There was also a wide distribution of several kinds of pipes

used for smoking tobacco, further demonstrating the wide range of trade of those items. When the Europeans arrived in the Northwest they introduced some new forms of tobacco as part of the trade with the Indians. Tobacco was used as a trade item, but also was important as a goodwill gesture and was sometimes used as a medium of payment.

As the trade between the whites and Indians increased, the demand for tobacco became insatiable. Tobacco became the key item in Indian-white commerce in the northwest as well as in every other part of North America. Hudson's Bay Company records clearly demonstrate that critical importance.

In the years after the treaty was signed, Puyallups increased their trade with non-Indians. Those commercial activities contributed significantly to the Puyallups' economy as well as to the prosperity and economy of the territory. For several decades the

Indians on the Puyallup Reservation raised surplus agricultural produce which they sold to non-Indians. This commerce was carried on with the support and encouragement of the United States. The Indians also cut timber from their land to sell to non-Indians.

Governor Isaac Stevens, who was in charge of negotiating treaties with the Indians in the Northwest explicitly recognized the importance of the Indian trade to the Indians and to the settlers. In the letter transmitting the Treaty of Medicine Creek, which had just been concluded, Stevens explained the Treaty provision in his letter to the Commission:

"The Indians on Puget Sound have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. They form a very considerable proportion of the Trade of the Sound... They catch most of the fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." (Emphasis added)

In the treaty negotiations Stevens specifically assured the Indians that they would

be able to continue to trade with the settlers. Referring to the increased opportunities offered in the treaty, Stevens said:

"Now there used to be twice as many Indians...and they could not sell salmon, oysters and cranberries to the settlers for there were none. Well, you can now not only sell these things but you will besides be furnished yearly with clothing, tools..."

There was only one limitation on that trade discussed. George Gibbs, a lawyer-ethnologist, who assisted Stevens and drafted the treaties in western Washington, reported earlier in 1854 on the considerable Indian trade with Vancouver Island and recommended that when treaties were made the Indians should agree to restrict their trading to American territory.

"The Clallams, as well as the Makahs and some other tribes, carry on a considerable trade with Vancouver's Island, selling their skins, oil, etc., and bringing blankets in return. At present it is hardly worthwhile to check this traffic, even if it were possible; but when the white population increases it may become necessary as a revenue measure. In any treaties made with them, it should enter as a stipulation that they

should confine their trade to the American side."

That suggestion was incorporated as Article 12 of the Treaty of Medicine Creek negotiated later in 1854.

The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States...

The treaty provision was designed to insure that the Indian trade would contribute to the prosperity of the territory, rather than to the British possessions. It was not intended to limit the volume of Indian trade, but rather to confine it to the American side of the border. Apart from this, no other restrictions were placed on Indian trading activities. No provision was inserted to effect that Indians would be required to have licenses or permits to trade or that their trading would be taxed. The most reasonable conclusion is that the Indians would have understood other limitations,

other than the geographical restriction in Article 12, were intended.

The Treaty of Medicine Creek included two other provisions which have a bearing on the Tribe's trade and commerce. Article 2 of the treaty set aside a reservation for the Puyallup's exclusive use. (The area included within the reservation was expanded by the Executive Order of January 20, 1857). One of the purposes for creating the reservation was to set aside an area where Puyallup Indians could continue to support themselves.

In Article 10 of the treaty, the United States agreed to provide the Indians with certain tools and training. The purpose of that provision was to create some additional means for the Indians to support themselves, since the vast cession of land would presumably reduce, to some extent, the Indians' access to natural resources. One result of the "tools and training" provision was the increased trade with non-Indians described earlier in this affidavit.

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/s/

BARBARA LANE

DATED the 7th day of October, 1980.

APPENDIX E

MEMORANDUM OF AUTHORITIES - U.S. TAX COURT
(EXCERPT pp. 138-141)
EXCERPTS FROM "REPLY BRIEF"(pp. 19-21) AND
"OPENING BRIEF" (pp. 31-34), AND LETTER FROM
DISTRICT COUNSEL INTERNAL REVENUE SERVICE
7-16-86

...Furthermore, it is clear that it has taken specific acts of Congress to impose income taxes upon the salaries of Federal Judges even though first attempts at this by the Congress were frustrated by Supreme Court decisions rendering these special acts null and void based upon Article III, Section I of the U.S. Constitution Evans v. Gore, 253 U.S. 245, 64 L.Ed. 887 (1920); Miles v. Graham, 268 U.S. 50 69 L.Ed. 1067 (). In Evans v. Gore, the income sought to be levied for the year 1918 was based upon §213 of the Act of February 24, 1919 (40 Stat. at L. 1062) which required the computation to embrace all gains, profits, income and the like including in the case of the President of the United States, [and others]...the compensation received as such.

"Petitioner here seeks to emphasize that the tax involved because of Constitutional language prohibiting diminution of salary while in office (Art 2 & 1 Cl. 6 in case of the President) was necessarily imposed by special act. In 1932 Congress by another special act included in gross income on the basis of which taxes were to be paid, the compensation of "Judges of Court of the United States taking office after June 6, 1932." This special act was upheld in the case of O'Malley v. Woodrough, 307 U.S. 277, L.Ed. 1289 (1939) in effect, it could be argued, overruling both Miles and Evans cases.

The O'Malley court upholding the special position taken by Congress that an income tax was not a diminution of salary while in office said at page 22 of its opinion:

"Thereby of course, Congress has committed itself to the position that a non-discretionary tax laid generally

on net income is not when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article 3, &1 of the Constitution."

It should be noted here that the O'Malley Court is upholding a special act of Congress which by its terms, acted prospectively only. Judge Woodrough was appointed Circuit Judge in 1933. In Evans v. Gore, the special enactment imposing income taxes on Judges acted upon Judges already in Office, not solely upon judges to be appointed after passage of the act. (See also Booth v. United States, 392 U.S. 339 (1924).

The U.S. Supreme Court's and Congress' treatment of Federal Judges salaries highlights the fact and legal reality that the passage of the 16th Amendment did not change or vary in anyway any pre-existing provisions of the U.S. Constitution pertaining to direct taxes and income taxes in particular. The 16th Amendment

based upon the presentation given in Section II of this "Memorandum of Authorities" manifestly lifted the apportionment among the states requirement only with respect to the imposition of income taxes. In other words, income taxes no longer need to be apportioned among the states according to their population in order to be Constitutional but instead can be imposed upon the population of each state excluding Indians not taxed without apportionment.

With respect to treaty Indians living in tribal relations, Congress has by most notable special legislation, likewise made it absolutely clear what their intent and policy is. This intent is clearly expressed in these Federal statutes:

4 U.S.C. 105 and 106 construed
together with 4 U.S.C. 109; and 18
U.S.C. 1162.

The above statutes under Title 4 are known as the Buck Act as set forth herein previously,

and in Sections 105 and 106 thereof authorize the imposition of State taxation requirements including state income taxes upon the inhabitants of federal areas, however in order (per legislature history) that this dramatic grant of authority to the States would not be construed by overly anxious "Indian fighting" government attorneys and Judges to include Indians in tribal relations, Congress simultaneously passed section 109 which expressly provides:

"Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

This act was adopted in 1940, and it is contended that nothing could be more clearly illustrative of express Congressional intent with respect to its firm policy of not distributing the Constitution by attempting to tax "Indians not otherwise taxed." In 1953

Congress by statute 18 U.S.C. 1162 (b) decreed in the process of committing certain Indian Country to State jurisdiction for crimes by or against Indians that:

"(b) Nothing in this section shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band or is subject to a restriction against alienation imposed by the United States..." (Emphasis added)

EXCERPTS FROM REPLY BRIEF (pp. 19-21)

F. TREATY INDIANS ARE NOT CONSTITUTIONAL
U.S. CITIZENS-- FOREIGN NATION STATUS

Appellee's appeal to patriotic sentiment based on contention that Appellant are U.S. citizens must fail.

Appellants living in tribal relations under Medicine Creek Treaty of 1854 are not allowed by the U.S. Constitution itself to be U.S.

citizens and any contended for Act of Congress to the contrary would be repugnant to the 14th Amendment of U.S. Constitution (14th Amendment, Secs 1 and 2; and Article I, Sec 2 which the 14th Amendment modifies and affirms).

The United States Supreme Court in deciding the leading Indian law case of Elk v. Wilkins, supra, recognized the constitutional consistency and integrity of the U.S. Congress in adopting the Civil Rights Act of 1866, by designating who was within the community of people of the United States, and who was not: (At page 102 thereof)

"...[T]he very Congress which framed the 14th Amendment in the 1st section of the Civil Rights Act of April 9, 1866 declar[ed] who shall be citizens of the United States...

"All persons born in the United States, and not subject to any foreign power excluding Indians not taxed". (Emphasis added)

Obviously "Indians not taxed" (as are Appellants) are not entitled to representation and have not received any, (in fact have

suffered the reverse, if anything), and therefore cannot be taxed either.

As recently as 1967, the U.S. Supreme Court discussed the very same 1866 Civil Rights Act and its direct relationship to the 14th Amendment's grant of Constitutional citizenship to "Negroes" and by clear implication the 14th Amendment's direct denial of Constitutional citizenship to Indians not taxed (i.e. those treaty Indians living in tribal relations). In the case of Afroyim v. Rusk, 1 387 U.S. 253, 18 L.Ed 2d 757, 87 S. Ct. (1967), the Court said: (at pages 262 and 263)

"It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States... We desire to put this question of citizenship and the rights of citizens...under the civil rights bill beyond the legislative power..." Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866)

In other words Congress cannot under any circumstance involuntarily make U.S. Citizens out of persons not subject to the complete

jurisdiction of the United States.

Moreover, under the Constitution of the United States, "Indians not taxed" (i.e. treaty Indians living in tribal relations) are not Constitutional citizens. Therefore, any attempt by Congress to render these persons citizens of the United States by the 1924 Indian Citizenship Act or any other such act would be in direct contravention of the 14th Amendment, Secs. 1 and 2. It is the first sentence of the 14th Amendment which determines who are citizens and who are not. It is the legislative record of debate pertaining to the 14th Amendment which is absolutely probative of the intentions of the Congressional framers of this amendment. In 1971, the U.S. Supreme Court again emphatically affirmed the Constitutional bases for citizenship in Rogers v. Belli, 401 U.S. 815, 28 L.Ed 2d 449 (1971), at page 830:

"Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was °declaratory of existing

rights, and affirmative of existing law,
so far as the qualifications of being born
in the United States and being subject to
its jurisdiction are concerned. United
States v. Wong Kim Ark, 169 U.S. at 688,
42 L.Ed at 905."

As stated above the first sentence of the 1st Section of the 14th Amendment is discussed in the legislative record of 1866, when the proposed 14th Amendment was being decided in the Senate. This record makes it absolutely clear as to whom would be U.S. Citizens and those who would not be regarded as such. See Cong. Globe, 39th Congress, 1st Sess., (1866) pages 2890 to 2897, for full text of debate. Certain excerpts are presented herewith, however, as fully persuasive on the points involved.

Mr. HOWARD. "I hope that amendment to
the amendment will not be adopted.
Indians born within the limits of the
United States, and who maintain their
tribal relations, are not, in the sense of
this amendment, born subject to the

jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations."

(At page 2897 of said Cong. Globe)

Mr. WILLIAMS. "I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, that giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. The first and second sections of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word 'citizens' as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. Section one provides that--

°All persons born in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'

If there be any doubt about the meaning of that paragraph, I think that doubt is entirely removed by the second section, for by the second section of this constitutional amendment Indians not taxed are not counted at all in the basis of representation. The words in the second section are as follows:

°Representatives shall be apportioned among the several States which may be included within the Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

EXCERPTS FROM OPENING BRIEF
(pp. 31-34)
ARGUMENT (B)

Due consideration must be given to fact that Petitioner's case is the only case, ever brought before the Tax Court and now comes to

the Court of Appeals involving trading activities on original allotted land of which Appellant Silas V. Cross is the direct descendant in possession. All other asserted "allotted land" rule cases do not involve original allotted land still in familial possession. E.g. Hoptowit v. C.I.R., 78 T.C. 137 (1982) 52 A.F.T.R. 2nd 83-5290, additionally the Hoptowit case did not raise same issues before high Court - Tax Court as present case of Appellants.

It is evident from a study of Tax Court decision herein appealed from that it cites and discusses cases from an angle which is designed to convey support for the premise that: Indians are subject to payment of Federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a treaty.^{5/} Then is seeks to have

5. Appellants Silas V. Cross and Silas A. Cross are forbidden U.S. Citizenship by the 14th Amendment to the U.S. Constitution so long as they maintain tribal relations even though Footnote continued on next page.

this generality misapplied to Appellants who are treaty Indians living in tribal relations.

Appellant's income is derived from the use and exploitation of original allotted land covered by a trust patent of 1886 issued to their direct forbearer Jimmy Cross "Pak-aw-tish" by trading on such land which is located within boundaries of historical Puyallup tribal reserve and even pre-reserve area.

Appellants do not use the terms "use and exploitation" lightly here. These are the

Footnote 5 continued.

Congress may have attempted by statute (in 1887 or 1924 or both) to confirm statutory citizenship on treaty Indians. "Indians not taxed" are not Constitutional citizens as are members of the general population. Any attempt by Congress to render Appellants citizens of the United States of America directly contravene 14th Amendment Secs. 1 and 2; and Article 1, Sec. 2 which the 14th Amendment modifies and affirms. The legislative record has set up to show its true meaning of the of debate on the 14th Amendment doubly confirms this: (Said debate recorded in Congressional Globe, 39th Congress, 1st Sess. (1866) p.p. 2890-2897. (At page 2893) "...[Mr. Turnbull] The provision is, that 'all persons born in the United States are citizens.' That means 'subject to the complete jurisdiction Footnot continued on next page.

exact terms which the Internal Revenue Service situation in this very type of federal Indian law case, which it now seeks to avoid:

Rev. Rul. 87-284 III, 26 C.F.R. 1.61.1 para. 2 states:

"Income derived from reinvesting income which is exempt under the five tests set forth in section II above is not exempt. To be exempt income must be directly derived or attributable to the use or exploitation of the allotted land.

See Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418

Footnote 5 continued.
thereof.'...[Mr. Howard] I think the language as it stands is sufficiently certain and exact. It is that 'all persons born in the United States and subject to the jurisdiction thereof' are citizens of the United States and the State wherein they reside." ...I think it is perfectly clear, when you put the first and second [14th Amendment] sections together that Indians not taxed are excluded from the term 'citizens'; because it cannot be supposed for one moment that the term 'citizen', as employed in these two sections is intended to apply to Indians who are not even counted [Constitutionally] under any circumstances as a part of the basis of representation."

(1935), Ct. D. 974, C.B. XIV-I, 158

(1935). Income from a trust allotment
rented from another Indian is not
exempt..." (Emphasis added)

Appellants agree that the foregoing
generalized statement asserted by the
government through the Tax Court is absolutely
true in so far as it pertains to persons of
American Indian racial descent who are non-
treaty Indians or Indians not living in tribal
relations or speaking of it another way just
plain "Indians". Several cases are cited in
support of the foregoing proposition including
Squire v. Capoeman, 351 U.S. 1 (1956) knowing
full well that both in that case and in Steven
v. Comm'r., 452 F.2nd 741 (9th Cir. 1971) which
are cases construing the General Allotment Act
of 1887, 25 U.S.C. Secs. 331 et seq. as well as
the extension of it in Stevens to the Indian
Reorganization Act of 1934 that this above
generality is a gross over simplification

completely out of the real context of Appellants' substantive position both under the treaty and acts of Congress with obvious intention of the same as aforesaid above in this brief. In fact, Stevens construes Squire v. Capoeman, with respect to the asserted generality contended for by the government who has misrepresented it in a way which is completely contrary to what the government contends Squire actually held. At pages 743 and 744 the Stevens court (9th Cir.) makes clear that:

"The determination of both appeals involves primarily the applicability and scope of the decision of the Supreme Court in Squire v. Capoeman, 1956, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 883. In that case the taxpayers' lands had been granted to them under the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331 et. seq. The Act provides that at the expiration of the trust period the United States will convey the land by patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

25 U.S.C. 348. An amendment to Section 6 of the Act, 25 U.S.C. 349, gives the Secretary of the Interior

discretionary power to issue a fee patent which would remove "all restrictions as a sale, incumbrance, or taxation of said land..." The Court (in Capoeman) held that under these provisions income derived from sale of timber from the allotted lands was exempt from capital gain taxes.

The Court recognized that "to be valid, exemptions to tax laws should be clearly expressed" and that the "Government's promise to transfer the fee 'free of all charge or incumbrance whatsoever' is not expressly couched in terms of non-taxability," but referred to its prior holding in Carpenter v. Shaw, 1930, 280 U.S. 363, 367, 50 S. Ct. 121, 74 L.Ed. 478, that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith," quoting the words of Chief Justice Marshall in

Worcester v. State of Georgia, 6 Pet. (31 U.S.) 515, 582, 8 L.Ed. 483, that "The language used in treaties with the Indians should never be construed to their prejudice." 351 U.S. at 6-7, 76 S.Ct. at 615...

Capoeman is not a technical or narrow decision; nor is its holding limited to capital gains taxes. Rather the court found implicit in Section 5 and the amendment to Section 6 of the General Allotment Act a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee." 351 U.S. at 8, 1 (Emphasis added)

"All taxes" must mean the obvious - all Federal and State taxes. Neither Appellant, Silas V. Cross nor his predecessors (father and grandfather) have ever been issued a fee patent to date. (Land is still in original trust status) Therefore said original allotted land is still in a trust status with the continuing statutory guarantee attached to it (this guarantee being consistent with all acts of Congress on subject of treaty Indians ever...

LETTER FROM DISTRICT COUNSEL
INTERNAL REVENUE SERVICE
7-16-86

Lewis E. Roane
P.O. Box 811
Duvall, WA 98019

Dear Mr. Roane:

Your letter dated may 20, 1986, addressed to Revenue Officer David Patnoe, has been referred to our office for answer.

The revocation of status as a United States and State of Washington citizen which you purportedly attempted on February 15, 1986, has

absolutely no effect on your liability for previously assessed tax liabilities not on your status as an individual subject to federal income tax. Baker v. Comm., 37 TCM 307 (1978), aff'd. mem., 639 F.2d 787 (9th Cir. 1980), cert. den., 451 U.S. 1018 (1981).

Section 1 of the Internal Revenue Code (I.R.C. 26 U.S.C.) imposes an income tax upon every individual who is: a citizen of the United States; a resident of the United States; and, to the extent provided in I.R.C. Sections 870 (b) and 877 (b), a nonresident alien. Treas. Regs. Section 1.1-1(a).

If a person liable to pay any tax neglects or fails to pay the same after notice and demand, the Internal Revenue Service is empowered to collect the tax by levy. I.R.C. Section 6331. The power to seize and sell a delinquent taxpayer's property or rights to property. Wages, bank accounts, automobiles, commissions, and receivables are examples of property which are subject to levy.

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We recommend that you seek the advice of competent counsel so that you will be fully appraised of the possible consequences of failing to pay the tax, penalties and interest which have already been assessed against you. As noted in the Final Notice of Intention to Levy sent to you on May 8, 1986, once a ten day period after the mailing of the notice has elapsed, enforcement action may be commenced against you without further notice.

Sincerely,

James A. Nelson
District Counsel

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APPENDIX F

OPINION/DECISION OF U.S. COURT OF APPEALS
(9TH Cir)
PETITION FOR REHEARING
ORDER DENYING REHEARING
MEMORANDUM DECISION OF U.S. TAX COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY DILLON, SR., FAYE DILLON)	NOS. 85-3676,
SILAS V. CROSS, MILLIE CROSS,)	85-3677,
SILAS A. CROSS, FRANCINE CROSS,)	85-7365,
JAMES M. and ROLEEN L. HARGROVE)	85-7424 &
THEODORE K. & ELIZABETH V. GORD)	84-7863
Appellants,)	DC No. CV 83-
vs.)	214-T
UNITED STATES OF AMERICA and)	TC Nos. 11879-
COMMISSIONER OF INTERNAL)	78,
REVENUE, ')	18177-83, &
Appellees.)	2072-82
_____)	OPINION

Appeal from the United States Tax Court
and the United States District Court
for the Western District of Washington
District Judge Jack E. Tanner,
Presiding

[Argued * and Submitted May 7, 1986 -
Seattle]

Before: WRIGHT and ANDERSON, Circuit Judges,
and CROCKER, ** Senior District Judge.
WRIGHT, Circuit Judge.

These appellants, enrolled members of the Puyallup Indian Nation, operated smokeshops on allotted land in the Puyallup Reservation in Pierce County, Washington. They asserted unsuccessfully before the district court or the Tax Court that their business income was exempt from federal income tax under the Medicine Creek Treaty of 1854, the General Allotment Act of 1887 and the United States Constitution. In the alternative, they argued that a portion of their income, equivalent to the fair rental value of their land, should be tax exempt.

In affirming the judgments below, we answer in the negative each of these questions:

1. Is income from a smokeshop on Indian

*Cross alone was argued. Dillon, Gord and Hargrove were submitted without argument on motion of the appellants.

** Of the Eastern District of California.

trust land exempt from federal income taxation under the Medicine Creek Treaty?

2. Is it exempt under the General Allotment Act, applying the rule of Squire v. Coplanar, 351 U.S. 1 (1956)?

3. Does equal protection require such income to be accorded the same tax-exempt status as that derived from agricultural, timber, mineral and other land-based activity?

4. Can an exemption for such income be found in congressional policy favoring tribal self-sufficiency?

5. Can the fair rental value of the land be allocated to "income derived directly from the land," to qualify for exemption under the Capoeman rule?

FACTS AND PROCEEDINGS BELOW

Dillons

During 1974 and 1975, the Dillons operated

a smokeshop on property allotted under the Indian Reorganization Act (IRA), 25 U.S.C. 465. They filed a joint tax return for 1974 but filed none for 1975. The IRS assessed additional taxes for both years.

The Dillons filed a refund action in federal district court, claiming that the smokeshop income was exempt under the Medicine Creek Treaty of 1854. The court concluded that the Treaty did not exempt smokeshop income and dismissed their claim for a tax refund.

Gords

During 1977 and 1978, the Gords operated a smokeshop on land held in trust pursuant to the IRA. They did not file a tax return for 1977, and the joint return filed for 1978 did not include smokeshop income.

They petitioned the Tax Court for a redetermination of deficiencies assessed by the IRS. They claimed an exemption under the Medicine Creek Treaty and the IRA. They

asserted also that taxation of smokeshop income violated the Fifth Amendment and Article I of the Constitution. In the alternative, they claimed that a portion of the smokeshop income (equivalent to the fair rental value of the land) was exempt from taxation.

The Tax Court sustained the IRS determinations, relying on its decision in Cross, filed the same day.

Crosses

In 1976, Silas V. Cross earned income from the operation of a smokeshop on the Puyallup Reservation. His son received wages for working in the smokeshop during 1976. Neither amount was reported on their respective joint 1976 tax returns. The IRS assessed deficiencies. Crosses' petitions to the Tax Court were based on the same theories asserted by the Gordes.

The Tax Court, in an opinion reviewed by the full court, sustained the IRS deficiency determinations.

Hargroves

During 1977, 1978 and 1979, Hargroves were partners in a smokeshop located on allotted trust land. They did not include income from the partnership on their federal returns for those years.

They petitioned the Tax Court² for a redetermination of deficiencies assessed by the IRS. The legal theories for exemption were identical to those raised by the Gords and the Crosses. The Tax Court, relying on its earlier decision in Cross, sustained the deficiencies.

A. Standard of Review

This court reviews de novo the interpretation and application of a treaty. Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir.), cert. denied, 105 S. Ct. 85 (1984). The district court's interpretation of a tax exemption accorded under the General Allotment Act is a conclusion of law reviewed de novo. Kirschling v. United States, 746 F.2d 512, 514 (9th Cir. 1984).

B. Introduction

Under Sections 1 and 61 of the Internal Revenue Code, federal income tax applies to "every individual" and to "all income from whatever source derived." 26 U.S.C. 1, 61. As a general rule, Indians, like other citizens, are subject to federal income taxation unless exempted by a treaty or an act of Congress. 1/ Hoptowit v. Commissioner, 709 F.2d 564, 565 (9th Cir. 1983).

1 Only Cross argues that federal income tax laws cannot apply to Indians because of an express constitutional prohibition. he contends that the reach of the Sixteenth Amendment is restricted by the phrase "excluding Indians not taxed" in Art. I, 2, cl. 3 of the Constitution. His challenge to the general applicability of federal income tax laws to Indians is without merit.

The reference to "Indians not taxed" in Article I of the Constitution recognizes merely that some Indians were not taxed by the states in which they resided. It does not restrain the federal government from taxing Indians. Jourdain v. Commissioner, 617 F.2d 507, 509 (8th Cir.), cert. denied, 449 U.S. 839 (1980). See also Fry v. United States, 557 F.2d 646, 649 n.9 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

Footnote continued on next page.

C. Medicine Creek Treaty

In each case, taxpayers claim income tax exemption under Articles 6 and 12 of the Treaty of Medicine Creek, 10 Stat. 1132. They contend that the Treaty preserved the Puyallup's right to trade and that taxation of smokeshop income impermissibly restricts that right in violation of the Treaty.

1. Article 6

This article authorizes the President to assign surveyed lots to Indians. It incorporates by reference Article 6 of the Treaty with the Omahas, providing that

such assigned land. . . shall not

Footnote continued

Cross argues also that the Internal Revenue Code cannot apply to treaty Indians because they "are not Constitutional citizens." This contention is also without merit. The Supreme Court has decided that "Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." Squire v. Capoeman, 351 U.S. 1, 6 (1956). The issue here is not whether appellants are within the scope of the Code, but whether any treaty or statute exempts their smokeshop income.

be aliened or leased for a longer term than two years; shall be exempt from levy, sale or forfeiture. . . until a State Constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions.

Treaty with the Omahas (1854), 10 Stat. 1043.

The government contends that these articles merely prohibit the forced transfer of assigned Indian lots until the property comes under the jurisdiction of a state constitution. The taxpayers contend that Article 6 reflects the intention to the parties to the Treaty to limit taxation to the possible future taxation of lands. To prevail on their claim, taxpayers must demonstrate that this restriction on alienation can reasonably be construed as a permanent federal income tax exemption for business operated on treaty land.

The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions. Choate v. Trapp, 224

U.S. 665, 675 (1912). However, this rule applies "only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemption." United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1966) (quoting Holt v. Commissioner, 364 F.2d 38, 40 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967), cert. denied, 450 U.S. 920 (1981). "The intent to exclude must be definitively expressed . . ." Choteau v. Burnet, 283 U.S. 691, 696 (1931).

The suggestion that an income tax exemption can be inferred from the alienation restrictions in Article 6 of the Treaty is not well founded. "Nontaxability and restriction upon alienation are distinct things." Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 421 (1935). An Indian's "wardship [status] with limited power over his property does not, without more, render him immune from the common burden [of federal income taxation]." *Id.*

2. Article 12

Taxpayers contend that the geographic trade limitation in this article of the Treaty must be construed to confer an income tax exemption. It provides: "The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States." Medicine Creek Treaty, 10 Stat. 1132.

Taxpayers argue that the parties intended no other restrictions on trading rights reserved to the Puyallup Indians. This court rejected a similar argument in Strom v. Commissioner, 6 T.C. 621, 627 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947). It affirmed the Tax Court's holding that the imposition of a tax upon income earned in carrying on a treaty-protected activity is not an impermissible restriction upon the right guaranteed by the Treaty. The court in Strom emphasized that at the time of the treaty

execution, the parties "certainly, did not contemplate the present [federal income tax] situation." Id. at 628. The disputed income tax here, as in Strom, is not a burden upon the treaty-protected right, but upon the income earned through the exercise of that right. The Treaty is not violated here by the imposition of a federal tax on smokeshop income.

The government is correct that the substantial historical evidence offered by taxpayers here fails to demonstrate that the parties intended the treaty to exempt Indians from all taxation of their trading income. The courts below were correct in concluding that the claimed Article 12 exemption does not arise from the plain language of the Treaty. "[The Supreme] Court has repeatedly said that tax exemptions are not granted by implication It has applied that rule to taxing acts affecting Indians as to all others" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156 (1973) (quoting Oklahoma Tax Commission v.

United States, 319 U.S. 598, 606-07 (1943).

While doubts about the meaning of an Indian treaty should be resolved in favor of the tribe, Washington v. Washington Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 675-76 (1979), the Treaty provisions relied on here are not ambiguous as to an income tax exemption. The reasonable inference from Articles 6 and 12 of the Treaty is that the parties did not intend geographic trade or alienation limitations to restrict the taxing authority of the United States to impose a tax not yet in existence. See Earl v. Commissioner, 78 T.C. 1014, 1017 (1982) (article in Medicine Creek Treaty reserving "the rights of taking fish, at all the usual and accustomed grounds and stations," is insufficient to establish a tax exemption for income derived from exercising fishing rights guaranteed by the Treaty).

The Medicine Creek Treaty does not confer a tax exemption for smokeshop income. 2/

D. General Allotment Act

Taxpayers contend that their smokeshop income is exempt from federal tax under the rule in Squire v. Capoeman, 351 U.S. 1 (1956), because it is "derived directly" from allotted land held in trust for them by the United States.

In Capoeman, the Court found an income tax exemption based on the General Allotment Act of 1887 (GAA), 25 U.S.C. 1331, et seq. 3/ It found a congressional intent to exempt allotted lands from all taxes until the fee interest was conveyed to the allottee. It held that income

2 Taxpayers are correct that Congress is presumed not to intend an abrogation of rights guaranteed by Indian treaties when it passes general laws. United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981). "But this rule applies only to subjects specifically covered in treaties...; usually, general federal laws apply to Indians." Id. This court has concluded that "there is no such specific language in ... the Treaty of Medicine Creek, 10 Stat. 1132 (1854)" sufficient "to exempt Indians from the laws of general applicability." Id. The treaty does not bar the application of general tax laws to Indian taxpayers here.

received by noncompetent Indians from the sale of standing timber on allotted land was exempt from federal income tax but that "reinvestment income" was not. 351 U.S. at 9. The Court defined the scope of this exemption: "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." Id. (quoting Cohen, Handbook of Federal Indian Law, 265).

The stated rationale for the "derived-directly-from-the-land" standard was the diminution of the land value.

Once logged off, the land is of little value. ...It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber

3 The GAA authorized allotments of reservation land to Indians. Allotted land was to be held in trust by the United States, for the "sole use and benefit" of the Indian allottees, for a period of at least 25 years. At the end of the trust period, the land was to be conveyed to the allottee "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 462, extended the periods of trust "until otherwise directed by Congress."

sale are preserved for [the allottee], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others.

Id. at 10.

The taxpayers contend that the "derived directly" test has been misinterpreted and misapplied by the IRS and the courts. They argue that the Capoeman test, properly applied, would exempt "any income of an individual Indian which is produced by the individual from use of his or her allotted land." 4/

The IRS and the courts have applied the Capoeman standard to tax income from "non-land-based" businesses conducted on trust land.

4 Even if the rule in Capoeman exempts the smokeshop income from federal income taxation, it cannot exempt the income of Silas A. Cross. His income was compensation for personal services, not the use of trust property. See Fry v. United States, 557, F.2d 646 (9th Cir. 1977) (employee's income from logging on reservation land derives from employment contract, not the land, and is not exempt under Capoeman); Commissioner v. Walker, 326 F.2d 261, 264 (9th Cir. 1964) (income received by employee as compensation for services rendered not "directly derived from tribal lands" and Capoeman rule is inapposite).

Anderson, 625 F.2d at 913 n.3. See, e.g., Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979) (en banc) (income from operation of motel, restaurant, and gift shop on tax-exempt tribal land), cert. denied, 444 U.S. 92 (1979); Hoptowit v. Commissioner, 78 T.C. 137 (1982) (income from smokeshop on allotted land), aff'd as to other issue, 709 F.2d 564 (9th Cir. 1983); Hale v. United States, 579 F. Supp. 646 (E.D. Wash. 1984) (rental income from smokeshop operated on allotted land).

Exemptions for income "derived directly" from the land have been upheld where the allottee has exploited or reduced the value of the land by mining, logging, agricultural or similar activity. See, e.g., Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971) (income from farming and ranching on allotted land); United States v. Daney, 370 F.2d 791 (10th Cir. 1966) (income from oil and gas lease bonuses attributable to allotted land); Big Eagle v. United States, 300 F.2d 1765 (Ct. Cl.

1962) (royalty income from extraction of minerals from allotted land).

The "exploitation" rationale is inadequate to describe the "derived directly" standard. As the dissenting Tax Court judges in Cross noted: "Farming and ranching, unless improperly conducted, do not damage or diminish the value of the trust land." Cross v. Commissioner, 83 T.C. 561, 572 (1984).

We find the language in Hoptowit v. Commissioner, 78 T.C. 137 (1982), helpful in clarifying the application of the Capoeiman rule. In Hoptowit, the Tax Court was confronted with a claim for exemption of smokeshop income. Like the taxpayers here, Hoptowit claimed that the smokeshop's location on the reservation was an essential factor in the generation of smokeshop income. Id. at 144. The Tax Court concluded that the taxpayer

did not receive the smokeshop income principally 'as a result of the use of reservation land and resources.' The mere fact that

[smokeshop] was located on reservation land is not determinative. The income was earned primarily through a combination of petitioner's labor, the sale of tobacco products (none of which were grown on reservation land, so far as it appears from the record), and the marketing of a claimed exemption from State taxes. In these circumstances, imposition of the income tax on petitioner's smokeshop income is not inconsistent with... the Treaty; any exemption ... would not extend to income only incidentally and not directly attributable to such land and resources.

Id. at 145 (Emphasis added).

In Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979), an enrolled tribal member operated businesses and leased buildings on her possessory holding of reservation land.^{5/} She sought an income tax exemption under the General Allotment Act. 597 F.2d at 712. The Court of Claims denied the exemption. It found the

⁵ The Puyallup Tribe contends that Critzer should not apply here because it involved possessory interests in tribal land instead of individual allotments. However, the court in Critzer attached no legal significance to the status of the land, finding a difference "only in the fact possessory holdings can never ripen into fee title." Critzer, 597 F.2d at 710. See also Hale v. United States, 579 F.Supp. 646, 648 (E.D. Wash. 1984).

business and rental income "was not directly derived from the land but rather emanated primarily from taxpayer's substantial investment in her improvements and her business activities related to those assets." Id. at 714. The court recognized that the land was of "some value," Id. at 714, in generating the income but refused to attribute all the business income to the land. 6/ Id.

We follow the approach used in Hoptowit and Critzer. The tax exemption must be denied here under the Capoeman rule because the smokeshop income was not generated principally

6 The Puyallup Tribe contends that Critzer ignored the Capoeman Court's intended distinction between "income from land" and "reinvestment income." This contention is without merit. The Critzer court's analysis implicitly concluded that business income attributable primarily to factors other than the land was more closely akin to "reinvestment" income than income "derived directly" from the land. Critzer, 597 F.2d at 713-14. To accept taxpayers' argument here (that all income from a business on Indian land is tax-exempt) "would require [the court] to ignore the word 'directly' in the 'directly derived' test." Id. at 713.

from the use of reservation land and resources. Instead, the income here was earned primarily through a combination of taxpayers' labor, the sale of goods produced off the reservation and improvements constructed on the trust land. This income is more akin to "reinvestment" income than income "derived directly" from the land and is taxable. 7/

7 Taxpayers claim also that their smokeshop income is exempt under two provisions of the Internal Revenue Code.

Section 894 provides: "Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle." 26 U.S.C. 894 (a).

Section 7852 provides: "No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title." 26 U.S.C. 7852 (d).

We need not decide whether 894 (located in "Part II - Nonresident Aliens and Foreign Corporations") applies to Indian treaties. Neither statute creates an income tax exemption not otherwise expressly established by treaty. The effect of each statute is merely to preserve whatever tax exemption is granted by treaty.

E. Equal Protection

Taxpayers contend that applying the Copeman test to exempt income from mining, timber and agricultural activities on allotted land, while denying an exemption for smokeshop income, is a violation of their Equal Protection rights under the Fifth Amendment. The government responds that any variation in tax treatment stems from differences in the trust lands, not from discriminatory treatment of similarly situated Indian taxpayers.

We rejected a similar equal protection challenge in Anderson, 625 F.2d at 917. Our analysis in Anderson is applicable here:

These are not suspect classifications, and no fundamental interest is involved. Therefore, the rational relation test applies, and the classifications "will not be set aside if any state of facts rationally justifying [them] is demonstrated to or perceived by the courts."

Id. at 917 (quoting United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4, 6 (1970)). See also Regan v. Taxation with

Representation, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.")

We find that Congress rationally sought to help Indians by exempting them from taxation of income derived directly from trust land, while refusing to exempt income only incidentally attributable to the land. This is consistent with the purpose of the GAA, "the protection of the property right of the allottee during the trust period." Hale, 579 F.Supp. at 648.

F. Policy considerations

Taxpayers and amici curiae argue that taxation of smokeshop revenue here would be contrary to an overriding congressional policy to encourage tribal self-sufficiency and economic development.

To the extent this argument seeks to base an income tax exemption on policy consideration alone, without specific exemptive

language in a statute or treaty, it must fail. In Fry v. United States, 557 F.2d 646 (9th Cir. 1977), we held that it was error to create for Indians an income tax exemption based on policy alone:

[I]t is one thing to say that courts should construe the treaties and statutes dealing with Indians liberally, and quite another to say that, based on these same policy considerations...., courts themselves are free to create favorable rules. ...Congress is the body which grants tax exemptions.

Id. at 649. See also Anderson, 625 F.2d at 917 (reversing grant of exemption that was based only on federal policies of optimal Indian land use and economic independence).

G. Allocation of Fair Rental Value to Income "Derived Directly" from Trust Land

Taxpayers and amici curiae argue that, absent a full exemption for smokeshop income, they are entitled to exempt at least a portion of their income equal to the fair rental value of their property. This issue was discussed in

Critzer, but that court refused to decide it on an inadequate record. 597 F.2d at 714. Five judges on the reviewing court in Cross dissented from the Tax Court's refusal to exempt "imputed rent" as "directly derived" from the land under the Capoeman test. Cross, 83 T.C. at 569.

This allocation argument is essentially another attempt by taxpayers to broaden the rule in Capoeman to exempt smokeshop income. The government's perspective on this issue is correct: "The simple answer to taxpayers' argument is that they did not receive any rental income with respect to their trust properties."

We reject taxpayers' allocation theory of exemption for two reasons. 8/ First, allocating imputed rent income to the trust property is not required or permitted under the Capoeman rule. The bare land's fair rental value bears no rational relationship to the

⁸ Taxpayers and amici curiae contend that the IRS has recognized the propriety of this allocation theory. They cite Rev. R. 60-377, but this revenue ruling was revoked in 1962 by Rev. R. 62-16.

amount of income "derived directly" from the improved land. Such allocation would permit exemption of all income from a business on trust land up to the land's fair rental value, even where the income is otherwise clearly outside the "derived directly" standard of Capoeman (for example, selling stocks and bonds from a telephone booth on trust land). See Critzer, 597 F.2d at 713.

Second, taxpayers and amici curiae have cited no authority (and we have found none) for imputing rental income to a taxpayer using his own property in the operation of a business. Nor, under general tax laws, may a taxpayer using his own property to generate business income, deduct than annual fair rental value of the property from his business income. Moreover, guaranteeing a tax exemption equal to the fair rental value of the property, where no rent was actually paid or accrued, is contrary to the business expense provision of 26 U.S.C. 162

(a).

We reject taxpayers' attempt to exempt a portion of their income based on fair rental value of the property. As the majority in Cross below concluded: "Aside from the difficult computational and valuation problems involved, we are not willing to assume that this constructed value represents income 'directly derived' from the land." 83 T.C. 29 (1984).

CONCLUSION

The judgments of the district court and Tax Court, finding the smokeshop income taxable, are affirmed. The Medicine Creek Treaty cannot reasonably be construed to exempt this income from federal taxation. Nor does the General Allotment Act exempt this income under the Capoeman rule, because it is not principally derived from the land or its resources.

We reject also taxpayers' attempt to exempt a portion of their smokeshop income, equivalent to the fair rental value of the land.

UNITED STATES COURT OF APPEALS
FOR the NINTH CIRCUIT

HARRY DILLON SR., FAYE DILLON,)	
SILAS V. CROSS, MILLIE CROSS,	)	NOS. 85-3676
SILAS A. CROSS, FRANCINE CROSS,	)	85-3677
et al,	)	85-7365
	)	85-7424
Appellants,	)	84-7863
)	
vs.	)	PETITION FOR
	)	REHEARING
UNITED STATES OF AMERICA,)	
AND COMMISSIONER OF INTERNAL	)	(FRAP 40)
REVENUE,)	
)	
Appellees.)	
-----)	

COME NOW Appellants Silas V. Cross et ux
and Silas A. Cross et ux (No. 85-7365) and
Petition this Court for a rehearing with respect
to its judgment filed and entered on June 19,
1986.

This petition is made for the purpose of
respectfully directing the Courts' attention to
the following prescribed situation.

"MATERIAL FACT OF LAW OVERLOOKED IN THE
DECISION" (FRAP 40)

a. (1) Elks v. Wilkens, 112 U.S. 94,
(1884) is apparently overlooked. This leading

case, not to date overruled (See Shepards-U.S. Supreme Cases), clearly defines "Indians not taxed" (as set forth in Article 1, Section 2, Clause 3, Const.) as "...those who held tribal relations and therefore were not subject to the authority of the United States under the power conferred upon Congress in reference to Indian tribes in this country." This definition by the U.S. Supreme Court is fully supported by Congressional debate on passage of the 14th Amendment (see Footnote 4 page 11 of Appellants Opening brief).

(2) It is an overlooked yet stipulated fact in this case that Silas V. Cross and Silas A. Cross are treaty Indians living in tribal relations ("Indians not taxed"). (See: Stipulation of facts para. 2 and joint Exhibit 2-b thereto. See Affidavit of Silas V. Cross para. 111). Accordingly the Court should avoid the shallowness of Jourdain vs. Commissioner 617 F 2nd 5078 (1980), suggesting "Indians not taxed" are merely Indians not taxed by a State

in which their Reserves are located when in fact and law, they are treaty Indians living in tribal relations, as are Silas V. Cross and Silas A. Cross. It is clear the Constitutional framers themselves intended these kinds of Indians (treaty Indians living in tribal relations) to be outside U.S. taxing jurisdiction.

B. The Court overlooked in large measure, if not entirely, key stipulated to facts about the Puyallup Indians understanding of the Medicine Creek Treaty not only at time it was entered into but, as it was understood by these very same treaty signing Puyallup Indians and their descendants well up to the mid-1970's. This overlooking of said facts coupled with the Courts apparent overlooking of the most basic true principle of Indian treaty construction (as set forth at page 36 of Appellant's Opening Brief) creates gross injustice. This principle is stated per U.S. Attorney General:

"This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not accordingly to their technical meaning, but in the sense in which they would be naturally understood by the Indians. Choctaw Nation v. United States, 119 U.S. 1, [7 S. Ct. 75, 30 L. Ed. 306]; ..." (Emphasis added)

The Puyallup Indian natural understanding - quite aside from the positive legal guarantees existing in 1854 at treaty time - are unrefuted, stipulated but overlooked facts in this case as follows:

At page seven of Affidavit of Silas V. Cross - (Exhibit 2-B to Stipulation before Tax Court) it is clearly set out as irrefutable established fact of this case that: (At para. XI) "...I personally know my Great Grandfather, Grandfather, Father, and myself, and many other Puyallups traded extensively from treaty time to the late 1970's without the U.S. Government ever asserting an income tax requirement upon our trading profits."

(At para. XII)

"That I have always understood that the oral traditions of Puyallup tribe clearly manifest and 'spell out' that it was not Governor Steven's [treaty agent for the U.S.A.]

intentions to tax us on any of our various activities as of then into the future."

"That it is clear that at the time of the Medicine Creek Treaty - 1854 based on the strong oral traditions and history of the Puyallups (including both upper (Scope-am-mish) and lower (Chuck-al-loots) - that the tribes in the area were both numerically and militarily superior to the American forces in the area. Therefore, had U.S. Government taxes of any kind been sought to be imposed upon any of our regular and usual profit making activities especially trading it would not and could not have been tolerated or agreed to in anyway." (Emphasis added)

Numerous other related stipulated - to factual matters (which have been overlooked and form the actual operative fact basics of this case) are contained in said Affidavit pages 6-14. Accordingly, it is attached herewith for review and ease of reference as Attachment "A".

C. The Court has apparently overlooked the

law in U.S. Supreme Court case which prophesied the exact effect of the type of decision now sought to be reconsidered and changed in this Court. U.S. vs. Rickert 188 U.S. 432 (1903) sets forth a powerful principle at page 536 of its opinion:

"The power to tax involves the power to destroy; the power to destroy may defeat and render useless, the power to create, and there is a plain repugnance to confer, on one government. The power to control the constitutional measure of another." (Emphasis added). (See page 22 of Appellants' Reply brief in this regard as well).

D. The Ninth Circuit Court of Appeals has apparently overlooked the essential law governing this type of case found in the "Judge Boldt" decision upheld by U.S. Supreme Court in pertinent parts: United States ex rel Certain Indian Tribes v. State of Washington, 394 F. Supp. 312 (1974); affirmed 443 U.S. 658 (1979). In as much as the Medicine Creek Treaty was entered into in what was at the time, Oregon Territory it contains within itself a solemn

United States pledge and guarantee against depredations of all kinds, including U.S. taxation activities as found by Judge Boldt, from the treaty enabling act itself - Oregon Donation Act (9 Stat. 323, Aug. 14, 1848): (At pages 353 and 354):

"by the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act °shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians..."
Section 14 of that act extended to the Oregon Territory the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which provides that °good faith shall always be observed toward the Indians; their lands and property shall never be taken without their consent.'" (Emphasis added)

See also Washington v. Washington State et al, 443 U.S. 658, 661 (1979), footnote 1.

By the terms of the aforesaid Act, according to "Judge Boldt" as well, there can be no impairment of right of Appellants in person or property except such right be extinguished by

treaty alone. Also good faith is not shown by asserting Federal income taxes upon Appellants and is tantamount at this time to the taking of their land and property without their consent.

E. The Ninth Circuit Court of Appeals by its high Judge Hon. Wright, Anderson and Crocker has overlooked law duly pronounced by the United States Supreme Court when Article 6 of Medicine Creek Treaty of 1854 was interpreted by them. This law is found in Cook v. United States, 288 U.S. 102, 121, 122 (1933) and should be related to the overlooked yet agreed and stipulated fact that Appellants Silas V. Cross and Silas A. Cross are conducting trading activities upon land originally allotted to their grandfather and great grandfather respectively and never out of familiar possession and control. Furthermore it should be kept in mind that this original allotted land is not legally subject to "sale, levy or forfeiture" for any reason per Article 6 of treaty with Omahas incorporated by reference

Article 6 of Medicine Creek Treaty. The
 Cook held:

"Our government lacking power to seize,
 lacked power because of the treaty to
 subject the vessel to our laws. to
 hold that adjudication may, follow a
 wrongful seizure would go far to
 nullify, the purpose and effect of the
 treaty".

With government unable to seize (levy) and
 sellant's allotted land or property it is
 unwise to contend that the government has
 jurisdiction over the Appellants in the
 context of this case.

This high Court has overlooked the fact
 of Congressional intent to live up to its treaty
 obligations with treaty Indians by not
 expressly designating this class of persons
 as subject to U.S. Taxation in derogation
 of treaty status. In doing this, the high
 Court has overlooked clear expressions of
 Congressional intent to exclude from taxation
 treaty Indians as stated before the Oregon
 Tax Act of 1848 (9 Stat. 323) which also

incorporated section 3 of Northwest Ordinance of 1787; Buck Act - 4 U.S.C. 109; and has completely ignored and overlooked the most current expression of Congress with respect to its intent not to impose Federal taxation upon Indians and Indian tribes with which it has treaty obligations. This clearest recent expression of Congress is found in 25 U.S.C. 2210 which provides; "All land or interest in land acquired by the United States for an Indian or Indian tribe under authority of this chapter shall be exempt from Federal, State and Local taxation." (Emphasis added) Said new section 2210 pertains to the General Allotment Act of 1887 Section 5 thereof (24 Stat. 388) by being in pari materia with it. AGAIN IT IS EMPHASIZED THAT THIS COURT MUST HAVE OVERLOOKED THIS 1983 ACT (25 U.S.C. 2210) IN REACHING ITS OPINION. THIS SECTION MAKES IT CLEAR THAT EXEMPTION FROM FEDERAL TAX PERTAINS TO USE OF ALLOTTED TRUST LAND.

This section (2210) is called to this

high Court's attention so that it might fairly, correctly and intelligently construe the so-called "directly derived" test arising out of the General Allotment Act of 1887 consistently with this latest clarification by Congress.

G. This high Court has overlooked the very important crucial facts fully stipulated to and duly made a part of the record on appeal by the Appellants and Government regarding the economic activities conducted upon Appellants Silas V. Cross' and Silas A. Cross' hereditary original allotted land. At pages 6 and 7 of Joint Exhibit 2-B in support of stipulation of fact before U.S. Tax Court (Affidavit of Silas V. Cross) it is clearly established factually:

"That presently in like manner and like custom of my immediate and remote ancestors I traded in many articles and make my living accordingly. This trade is based on my tribe's reserved right to do so. The articles I trade in (the first of which I hand manufacture)

are:

1. Pow-wow drums made to ancient

specifications and often stretched with similar materials such as deer skin. I trade these items with individuals belonging to tribes in the whole of the west on a fairly large scale.

2. I am a fisherman and I both sell and trade my seasonal net catches.

3. Recently with a Bureau approved tribal code for liquor sales I sell beer and other liquor.

4. I buy, trade, barter and sell bead work with leather items, as well as wearing garments and other bead work.

5. I buy, trade, barter and sell Indian hand manufactured woolen sweaters and caps.

6. I trade in tobacco products and numerous miscellaneous goods. I do all of the foregoing manufactory and trading on my own trust land.

This high Court obviously does Appellants a grave injustice by not deciding this case upon

the issues truly derived from the true facts of record as aforesaid. In as much as the I.R.S. assessment (Notice of deficiency) in this case covers all the foregoing economic activities it is only fair that any comprehensive law decision shall relate to these operative facts.

H. This high Court has overlooked the fact that Silas A. Cross is a direct heir per Article 6 of the Medicine Creek Treaty of 1854 to the subject original allotted trust land as the son of Appellant Silas V. Cross. This fact has a bearing upon any Court determination that Silas A. Cross is some type of general wage earner, (which he is not). See Stipulation of Facts - before U.S. Tax Court and also para. 4 thereof which stipulates that "...Silas V. Cross...and his son have all resided on the original land allotted..."

I. This high Court has overlooked elementary law that general Acts of Congress do not apply to Indians in tribal relations.

(Note: Conversely general Acts of Congress do apply to American Indians not in tribal relations). The leading law case of Elk v. Wilkins, 112 U.S. 94 (1884) makes it clear that an "Indian not taxed" is a treaty Indian living in tribal relations. So does the Congressional debate on adoption of the 14th Amendment to the U.S. Const. See the Cong. Globe 39th Cong. 1st Sess. (1886) pp 2890-2897. The Elk case, at page 100, sets forth the immutable principle in effect to date that : "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest and intention to include them." 26 U.S.C. Secs. 1 and 61 are General Acts of Congress undoubtedly, and contain no clear manifestation of intention to include treaty Indians living in tribal relations.

J. This high Court has overlooked law which states Indian nations are to be treated with the same dignity at law as foreign nations. See page 48 of "Memorandum of Authorities" submitted to U.S. Tax Court below and made part of the

Clerks' record herein. It is stated therein:

"Felix Cohen in his famous highly authoritative, Handbook of Federal Indian Law, in Chapter 3, Sec. 1 on "The Legal Force of Indian Treaties states:

'That treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view which has been repeatedly confirmed by the federal courts and never successfully challenged.' (Emphasis added)

See Holden v. Joy, 17 Wall 211 at 242 for further confirmation of the above-referenced authority."

Imposition of income tax assessments with attendant seizures of Indian properties upon Indian treaty lands if held to be in accord with U.S. treaties with Indians brings about a state of abrogation and disrespect. The United States does not tax foreign nations.

K. The high Court overlooks law in that since 26 U.S.C. 894 and 26 U.S.C. 7852 are in fact and law general Acts of Congress they will by their terms apply to Appellants if the Court

persists in applying other general revenue Acts of Congress to them. There is no reason to apply some general revenue Acts of Congress to Appellants and ignore other ones simply because these other ones (26 U.S.C. 894 and 26 U.S.C. 7852) confer exemption to Appellants by their very terms. If this is regarded as "catch 22" law, it is not of Appellants doing. But where the Court, as here, has construed the Medicine Creek Treaty of 1854 as in effect giving rise to U.S. taxation obligations upon Appellants the aforesaid sections must provide exemptions therefrom.

MOST IMPORTANTLY

L. the high Court has overlooked and therefore has failed to recognize an important Act of Congress relating to when restriction upon alienation of Appellants original allotted trust land shall cease. It is obvious that it did not legally cease upon Washington Statehood as this high Court in this case has concluded

but can only cease (which it has not to date) upon terms set forth by Congress in 1904 Act (33 Stat. 565, April 28, 1904) these terms are: consent of the United States is given upon alienation alone. Said Act in its entirety provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land. (Emphasis added)

APPROVED, April 28, 1904.

The Court has apparently overlooked the key operative fact in this regard that no alienation has ever taken place with respect to the subject land of Appellants. The government

has stipulated that the land is still the original property of Silas V. Cross, his son and their direct predecessors.

M. Actually the Government has conceded the claim of exemption by Appellants based directly upon the 6th Article of the Treaty with the Omahas (incorporated into Article 6 of Medicine Creek Treaty of 1854) by its failure to respond to this claim of exemption in any way in its Answering Brief. The Court has apparently overlooked this procedural fact as well as the legal conclusion that follows from it. It is obvious to Appellants that the Government would choose not to respond to this claim of exemption because of its requirement of good faith pleading before this high Court. To respond they would have had to bring out the facts in the stipulation referred to above, and the said 1904 Act. By not responding (as a matter of choice) they somehow logically or otherwise correctly predicted that this high Court would

in effect incorrectly carry their burden for them to their advantage. Apparently the Court has overlooked law which prevents it from deciding cases of this type on their own doing.

CONFLICT WITH COURTS OWN PREVIOUS DECISION OF GREAT MAGNITUDE IS RESULT OF THIS DECISION SO FAR.

N. The Court has no doubt overlooked the law clearly announced and applied in the very leading Federal Indian law case of Stevens v. Commissioner, 452 F.2d 741 (1971) 9th Cir., that statutes in pari materia are to be construed together. In this Stevens case the Court construed the General Allotment Act of 1887 together with Section 5 of the Indian Reorganization Act of 1934 to reach the obvious conclusion of intended tax exemption. In 1983 said Section 5 of the Indian Reorganization Act was amended making its terms express and very clear (25 U.S.C. 2210) regarding tax exemption and clearly precludes Federal taxation as well as State and local taxation. The Court in this

regard has apparently overlooked the fact that "Federal taxation" in 1983 in 25 U.S.C. 2210 means Income taxation as this is the only significant tax the Federal Government maintains.

O. The Court has apparently overlooked the fact that the Silas V. Cross and Silas A. Cross case coming to Circuit Court of Appeals via the Tax Court has its own set of established facts materially different in many aspects from that of the Harry Dillon, Faye Dillon cases coming to Circuit Court of Appeals via the U.S. District Court in Tacoma, Washington. It is upon these latter cases that the factual basis of the subject decision seems to be based. It would be a serious matter for this Court to address should this Court concede now this patent overlooking of the factual basis of the Silas V. Cross and Silas A. Cross case.

CONCLUSION

Based on the foregoing matters duly pointed

out to the Court's attention pursuant to FRAP 40 a rehearing related to the effect of the foregoing items should be granted.

DATED this 22nd day of July 1981

Respectfully submitted,

SILAS A. CROSS
Appellant Pro se

83 T.C. No. 29

UNITED STATES TAX COURT

SILAS V. CROSS AND MILLIE CROSS, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

SILAS A. CROSS AND FRANCINE V. CROSS,
Petitioners v. COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket Nos. 11879-78, 11880-78. Filed
September 27, 1984.

Petitioners, members of the Puyallup Indian Nation, operate a smokeshop on land held in trust by the United States under the provisions of the Medicine Creek Treaty of 1854 and the General Allotment Act of 1887. Held, income derived from the smokeshop is taxable because it is neither "directly derived" from the underlying trust land, nor expressly exempted

from taxation by any statute or treaty. Held further, smokeshop income allocable to the fair rental value of the unimproved land upon which the smokeshop sits is not income "directly derived" from the trust land within the meaning of Squire v. Capoeman, 351 U.S. 1 (1956) and is not excludable from gross income.

Frederick O. Frohmader, Charles J. Herrman, and Norman L. Margullis, for the petitioners in docket No. 11879-78.

Charles J. Herrman and Norman L. Margullis, for the petitioners in docket No. 11880-79.

Thomas N. Tomashek, for the respondent.

OPINION

WILBUR, Judge: In these consolidated cases respondent determined the following deficiencies and additions to tax in petitioners' Federal income taxes:

<u>Docket No.</u>	<u>Petitioner</u>	<u>Year</u>	<u>Deficiency</u>	<u>Tax</u>
11879-78	Silas V. & Millie Cross	1976	\$27,233	\$1,362

1/
Sec. 6653(a)
Addition to

11880-78 Silas A. & 1976 542 27
 Francine V. Cross

After concessions, the only issue remaining for our decision is whether income earned by an enrolled member of the Puyallup Indian Nation from the operation of a smokeshop upon land held in trust by the United States is subject to Federal income taxation. 2/

This case was submitted under Rule 122, Tax Court Rules of Practice and Procedure. All facts and attached exhibits are incorporated herein by this reference.

The petitioners in each of these cases are husband and wife. Petitioner Silas V. Cross and petitioner Silas A. Cross are father and son and both are enrolled members of the Puyallup Indian Nation. All petitioners resided in Tacoma.

1 All section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable year in issue. facts have been stipulated. The stipulation of

2 Respondent conceded that petitioners were not liable for the addition to tax under sec. 6653 (a) for the year 1976.

Pierce County, Washington, within the boundaries of the Puyallup Indian Reservation when the petitions herein were filed.

Petitioner Silas V. Cross (Cross) is the beneficial owner of land held in trust by the United States of America (trust land). 3/ The original patent granting beneficial ownership of the trust land was issued to his grandfather on January 30, 1886, under the provisions of the Medicine Creek Treaty of 1854 (Medicine Creek Treaty), 10 Stat. 1132.

The trust land also falls under the jurisdiction of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. sec. 331 et seq. (1982). The purpose of the General Allotment

3 Petitioner has restricted title to this property, meaning that he is "noncompetent" to alienate or encumber the property without permission of the Secretary of the Interior. Generally, petitioner is classified as a noncompetent ward of the United States. See Stevens v. Commissioner, 452 F.2d 741, 742 n. 1 (9th Cir. 1971), affd. in part and revd. in part 52 T.C. 330 (1969), supplemental opinion 54 T.C. 351 (1970).

Act is to preserve the value of land in trust until the Secretary of the Interior determines that the individual allottee is competent to hold title to the land in fee simple. 4/

Cross operates the Cross Smokeshop on .62 acres of the original patent allotted to his grandfather in 1886. In 1976, the fair rental value of the .62 acres was \$6,500, based upon the rental value of the property for use in the operation of a smokeshop or other similar commercial enterprise, the highest and best use of this particular property.

In 1976, the net profit received by Cross

4 The purpose of the General Allotment Act is to protect Indians' interest in their land and "to prepare the Indians to take their place as independent, qualified members of the modern body politic." Board of Commissioners v. Seber, 318 U.S. 705, 715 (1943). The allotted parcels are held in trust until a time when the property is transferred to the allottee, "in fee, discharged of said trust and free of all charge or encumbrance whatsoever." General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. sec. 348 (1982). Thus, the General Allotment Act seeks to preserve the value of the allotted land until the allottee is judged competent to handle his own affairs.

from operation of the smokeshop was \$41,687. This income resulted from the sale of cigarettes, other tobacco products and merchandise sold in the smokeshop. The son (petitioner Silas A. Cross) received \$1,899 in wages for working at the smokeshop in 1976. None of the petitioners reported these amounts as income on their respective joint 1976 Federal income tax returns.

Respondent determined that both the smokeshop income and the wages paid to the son were includable in petitioners' respective gross incomes.

Section 61 defines gross income to include "all income from whatever source derived." It is well established that the income of Indians is taxable under this section, "unless an exemption from taxation can be found in the language of a Treaty or Act of Congress." Commissioner v. Walker, 326 F.2d 261, 263 (9th Cir. 1964); Jourdain v. Commissioner, 71 T.C. 980 (1979), affd. 617 F.2d 507 (8th Cir. 1980);

Hoptowit v. Commissioner, 78 T.C. 137 (1982),
 affd. 709 F.2d 564 (9th Cir. 1983). The mere
 fact that petitioners are Indians will not
 preclude them from being liable for the payment
 of income tax. Choteau v. Burnet, 283 U.S. 691
 (1931); Superintendent v. Commissioner, 295 U.S.
 418 (1935). In order to prevail, petitioners
 must point to "express exemptive language in
 some statute or treaty" showing that they need
 not include amounts in their gross income.
United States v. Anderson, 625 F.2d 910, 913
 (9th Cir. 1980); Karmun v. Commissioner, 82 T.C.
 201, 204 (1984). 5/ See Welch v. Helvering, 290
 U.S. 111 (1933).

Petitioners have failed to show an express
 exemption in any Treaty or Act of Congress.
 Thus we must agree with respondent that income
 from the smokeshop, as well as wages paid for
 working in the smokeshop, constitutes taxable

5 Cf. Swiger v. Commissioner, T.C. Memo. 1984-
 228 (where the Court restated the requirement of
 the presence of express language to exempt
 smokeshop income from taxation).

income under section 61.

Petitioners primary contention is that the Medicine Creek Treaty is a contract between the United States and the Puyallup Indian Nation reserving by implication the power of taxation in the Puyallup Indian Nation. Petitioners rely on two principles of contract construction: language is to be construed most strongly against the entity responsible for it; and, where items are specified in detail in a contract, other items of the same general character are excluded by implication on the ground that the specific terms express the meaning of the parties. Sands, Sutherland Statutory Construction (4th ed. 1972). We do not find these general principles of contract law to be applicable to this case.

The Medicine Creek Treaty, 10 Stat. 1132, in pertinent part states: "Article 12. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States." Petitioners

ask us to conclude that this geographical restriction in Article 12 is the only trade limitation which was intended by the United States and the Puyallup Indian Nation when the treaty was executed. They argue that taxing the income from the smokeshop would be a further constraint on trade, not allowed under the treaty. We reject this interpretation as not arising from the plain language of Article 12.

At the time the Medicine Creek Treaty was entered into, the Federal income tax did not yet exist. Posin, Federal Income Taxation, Section 1.01, p. 1 (1983). 6/ The parties surely did not intend a geographical trade limitation to restrict the taxing authority of the United States to impose a tax not in existence.

Moreover, we cannot find that petitioners have been exempted from the tax by implication. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156 (1973); Fry v. United States, 557 f.2d 646,

6 See also Swiger v. Commissioner, *supra*.

649 (9th Cir. 1977); Jourdain v. Commissioner, 71 T.C. at 990. Any exemption from taxation for Indians must be expressly stated in a Treaty or Act of Congress. United States v. Anderson, supra. The Medicine Creek Treaty simply does not provide petitioners with an express restriction on the ability of the United States to tax the profits arising from trade carried out on trust land. Earl v. Commissioner, 78 T.C. 1014 (1982).

The General Allotment Act, 25 U.S.C. sec. 331 et seq., under which jurisdiction the trust land falls, similarly fails to exempt petitioners' income from taxation. 7/ In Squire v. Capoeman, 351 U.S. 1, 9 (1956), the Supreme Court concluded that there exists within the General Allotment Act, an exemption from taxation of income from land held in trust by the United States, if such income is "directly derived" from the land. Quite clearly income

7 See note 4, supra.

from land is not generally exempt, but only income "directly derived" from the land. The profits from petitioners' smokeshop do not fall within this narrow exemption.

In Squire v. Capoeman, supra, a noncompetent Indian, contested the inclusion in gross income of amounts derived from the sale of timber growing on land held in trust for him by the United States pursuant to the General Allotment Act. "the land was forest land, covered by coniferous trees from one hundred years to several hundred years old," and "was of little value after the timber was cut." Squire v. Capoeman, supra at 4. Quoting an earlier attorney general, that "it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian" (351 U.S. at 8), the Court read the General Allotment Act as exempting from tax income "directly derived" from the land itself, thus exempting the timber sales proceeds from the capital gains tax.

However, this exemption was restricted to income "directly derived" from the land itself. The Court stated that:

Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside *** and for which it was allotted to him. ***Unless the proceeds of the timber sale are preserved for [the taxpayer], he cannot go forward when declared competent with the necessary chance of economic survival in competition with other.*** [Fn. ref. omitted. Squire v. Capoeman, supra at 10].

In petitioners' case, the continued use of the land for retail sales from a smokeshop does not decrease the economic value of the land or impair the capacity of a competent Indian to "go forward***with the necessary chance of economic survival." 351 U.S. at 10. In the circumstances before us the land (along with other capital assets and labor) has been used to produce a business income from the smokeshop. Unlike these circumstances, the cases which have applied the "directly derived" exemption involve only situations where there is exploitation of

the land itself. Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971) (income from farming and ranching is tax exempt); United States v. Daney, 370 F.2d 791 (10th Cir. 1966) (income from oil and gas leases is tax exempt); Hayes Big Eagle, et al v. United States, 156 Ct. Cl. 665, 300 F.2d 765 (1962) (royalties from mineral deposits are tax exempt).

Having found no court which has exempted the income from retail sales from taxation under the authority of the General Allotment Act, we find no reason to do so either. Moreover, this Court has consistently held that income from the sale of cigarettes and tobacco (smokeshop income), is taxable. Hoptowit v. Commissioner, 78 T.C. 137 (1982). 8/ Our finding of taxability may reduce the profits retained by petitioners, but it does not interfere with either the trade

8 Cf. Comenout v. Commissioner, T.C. Memo. 1982-40; Swiger v. Commissioner, T.C. Memo. 1984-228. See also Hale v. United States, 579 F.Supp. 646 (E.D. Wash. 1984), and Critzer v. United States, 220 Ct. Cl. 43, 597 F.2d 708 (1979).

rights granted under the Medicine Creek Treaty, or the intended purpose of the General Allotment Act. 9/

Petitioner's alternative argument attempts an end run around this formidable line of authority. Petitioners argue that the portion of the smokeshop income allocable to the fair rental value of the unimproved land upon which the smokeshop sits should be excluded as income

 9 Petitioners' additional arguments regarding the applicability of taxing statutes and the Constitutional power of Congress to tax Indians are unpersuasive. Reliance on Elk v. Wilkins, 112 U.S. 94 (1884), is unfounded and runs contrary to the great weight of decisions which state that general legislative acts of Congress do apply to Indians. This, of course, includes the Federal income tax. F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Squire v. Capoeman, 351 U.S. 1 (1956); Jourdain v. Commissioner, 71 T.C. 980 (1979), affd. 617 F.2d 507 (8th Cir. 1980). In addition, petitioners' argument that the phrase "Indians not taxed," in the Constitution (Art. I, sec. 2, cls. 3 and Amend. 14, sec. 2), refers to taxation of Indians by the United States is erroneous. It is well settled that "Indians not taxes" refers only to taxation by the States. It is not to be construed as a restriction on the taxing power of the United States. Jourdain v. Commissioner, supra; Comenout v. Commissioner, supra.

"directly derived" from the land within the meaning of *Squire v. Capoeman*, supra. Put differently, petitioners argue that the fair rental value for the land of \$6,500 is the amount of smokeshop income which is generated from the land itself and is properly excludable. For this indirect construction of income "directly" derived -- a construction dramatically extending existing case law-- petitioners rely only on dicta from *Critzer v. United States*, 220 Ct. Cl. 43, 597 F.2d 708 (1979). 10/

10 The Court of Claims rejected the taxpayer's claim of exemption in *Critzer v. United States*, supra but went on to state:

[W]e do not say that the land is not of some value in helping create income such as that realized from the operation of a motel. Even the Government admits that it might be appropriate in certain instances to allocate income based upon the relative value of the land vis-a-vis any improvements or services. However, we do not reach this problem of allocation in the matter of Mrs. Critzer. That issue remains for yet another case on another day, since plaintiff has not raised it in the case at bar. [220 Ct. Cl. at 53, 597 F.2d at 714. Fn. ref. omitted. Emphasis in original.]

In effect, petitioners ask us to exclude imputed rent on the land from their smokeshop income on the theory that this imputed rental income is "directly derived" from the land within the meaning of Squire v. Capoeman, supra. Aside from the difficult computational and valuation problems involved, we are not willing to assume that this constructed value represents income "directly derived" from the land. Certainly it is a long, long way from the sale of timber in Squire v. Capoeman, supra which the Supreme Court viewed as tantamount to a disposition of the land.^{11/} Clearly none of the cases have gone anywhere near as far as petitioners suggest. See Stevens v. Commissioner, supra (income from farming and ranching is tax exempt); United States v. Daney, supra (income from oil and gas leases is tax exempt); Hayes Big Eagle, et al v. United

¹¹ "Once logged off," the Court stated, "the land is of little value." Squire v. Capoeman, supra at 10.

States, supra (royalties from mineral deposits are tax exempt).

We specifically decline to express any opinion on the results reached on different facts in Hale v. United States, 579 F. Supp. 646, 648 (E.D. Wash. 1984). Nevertheless, we agree with the court that:

The essential basis of Capoeman is the protection of the property right of the allottee during the trust period. See United States v. Anderson, 625 F.2d 910 (9th Cir. 1980) and Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), cert. denied 386 U.S. 931 (1967). There is not exploitation of the land itself in this case, nor is its value reduced by the operation of the smokeshop. the plaintiff's argument ignores the word "directly" in the "directly derived" test. We agreed with the Hale court that the proper focus is on income directly derived from the land, and that to meet this test there must be some exploitation of the land itself. Indeed, if petitioners imputed rent exclusion is

sanctioned, the word direct has little meaning, for all income connected in any way with the land would then be "directly derived" from the land. In Critzer v. United States, 220 Ct. Cl. at 52, 597 F.2d at 713, the court observed that if "plaintiff were to sit in a telephone booth on her Indian land and sell stocks and bonds by phone from the booth, it would be ludicrous to attempt to argue that any income, so earned, was directly derived from the land." Yet petitioners imputed rent theory, if sanctioned, would require such a conclusion, and the conclusion would be applicable to a potentially endless variety of businesses. Declining to take through taxation a significant portion of a gain that effects a corresponding diminution of the trust asset is one thing; declining to tax income from repetitive use of the asset effecting no diminution in value is quite another. The former is a breach of faith with Indian citizens; the latter a breach of faith

with all other taxpayers, including Indians. For these reasons, we note our agreement with Hale v. United States, supra without further belaboring the additional problems petitioners' theory presents.

Decisions will be entered under Rule 155.

Reviewed by the Court.

HAMBLIN, J., dissents.

CLAPP and GERBER, JJ., did not participate in the consideration of this case.

DAWSON, SIMPSON, GOFFE, WILES, NIMS, SHIELDS, SWIFT and JACOBS, JJ., agree with the majority opinion.

CHABOT, J., concurring: I join in so much of the majority's opinion that concludes that petitioners are generally taxable on their smokeshop income. Although I also agree with the majority's conclusion as to petitioner's alternative argument, as applied to the facts of the instant case, I disagree with the majority's analysis.

The broad sweep of the majority's opinion

apparently would preclude an exemption for rent received by an Indian beneficial owner of trust land from a smokeshop operator, even if the rent was received solely for the right to use the land (and not, for example, for the building). For the reasons explained in Judge Parker's dissenting opinion, *infra*, I do not believe that is the law.

Nevertheless, in the instant case, no rent was paid to any of the petitioners. Cross' income was from the operations of the smokeshop. Since he leased neither the land, nor the land in combination with anything else, to anyone, there does not appear to be any reason to allocate any part of Cross' smokeshop income to land rental. I do not believe that we have any general authority in the law to impute rental income to the owner of an asset merely because the owner also uses the asset. The instant case does not appear to warrant such imputation of rental income. From this I

conclude that, in the instant case, no part of Cross' income should be excluded.

Accordingly, I concur in the result reached by the majority, even though I disagree with the majority's analysis of the rental issue.

COHEN, J., agrees with this concurring opinion.

PARKER, J. dissenting in part: I have no quarrel with our prior Indian smokeshop cases and I agree that they are dispositive of the principal issue in this case. 1/ However, none of those cases addressed the issue of whether rental income from restricted, allotted land

1 Hoptowit v. Commissioner, 78 T.C. 137 (1982), affd, on a related issue 709 F.2d 564 (9th Cir. 1983); Swiger v. Commissioner, T.C. Memo. 1984-228; Comenout v. Commissioner, T.C. Memo. 1982-40, on appeal (9th Cir. Dec. 10, 1982). While I might have decided the Hoptowit case on a more narrow ground since the taxpayer in that case was merely the lessee of another noncompetent Indian's allotted land (see footnote 2 below), I would have reached the same result. The Swiger and Comenout cases, however, did involve noncompetent Indians using their own allotted land for the operation of a commercial business, and I agree with the holdings in those cases. See also Critzer v. United States, 220 Ct. Cl. 43, 597 F.2d 708 (1979), cert. denied 444 U.S. 920 (1979).

(hereinafter trust land) or some portion of the smokeshop income allocable to the land itself is income "derived directly" from the trust land within the meaning of Squire v. Capoeman, 351 U.S. 1 (1956), and thus exempt from tax in the hands of the individual Indian allottee. 2/ I think rental income to the Indian allottee or he

2 The benefit of the exemption under Squire v. Capoeman, 351 U.S. 1 (1956), flows only to the individual Indian allottee and then only as to income derived from his own allotted land. United States v. Anderson, 625 F.2d 910, 914-915 (9th Cir. 1980), cert. denied 450 U.S. 920 (1981); Fry v. United States, 557 F.2d 646, 648 (9th Cir. 1977), cert. denied 434 U.S. 1011 (1978); Holt v. Commissioner, 364 F.2d 38, 41 (8th Cir. 1966), cert. denied 386 U.S. 931 (1967). See also Wynecoop v. Commissioner, 76 T.C. 101, 105-107 (1981). for this reason, I of course agree with the majority that the son's wages from working in his father's smokeshop are taxable. Even where income is "derived directly" from the trust land within the meaning of Squire v. Capoeman so as to be tax exempt in the hands of the tribe (a nontaxable entity) or in the hands of the individual Indian allottee himself, the income would not retain its tax-exempt character in the hands of an employee whose wages are paid out of such tax-exempt income. See Hoptowit v. Commissioner, 709 F.2d 564 (9th Cir. 1983), affg. 78 T.C. 137 (1982) (services as member of tribal council); Commissioner v. Walker, 326 F.2d 261 (9th Cir. 1964) (services as an elected tribal treasurer); Footnote continued on next page.

portion of his smokeshop income allocable to the land itself is income "derived directly" from the trust land, and for that reason I dissent from the majority's unduly restrictive reading of the Squire v. Capoeman exemption.

Here, there is no question that petitioner Silas V. Cross (Mr. Cross) is an individual Indian allottee of the class entitled to the benefit of the Squire v. Capoeman exemption. 3/ The only issue is whether the exemption for income "derived directly" from such trust land

Footnote 2 continued

Jourdain v. Commissioner, 71 T.C. 980 (1979), affd., 617 F.2d 507 (8th Cir. 1980), cert. denied 449 U.S. 839 (1980) (services as chairman of Indian tribe).

3 See footnote 2. the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. sec. 331, et seq. (1982), provides that the United States is to hold in trust title to lands allotted to Indians under various Treaties until the Secretary of the Interior determines the allottees are competent to hold fee simple title to their allotted lands. The 1887 Act initially provided for a trusteeship of only 25 years, but this trusteeship was periodically extended by various Executive Orders and finally was extended indefinitely by the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 462 (1982). See Squire v. Capoeman, supra, 351 U.S. at 3-4.

encompasses rental income from the trust land or a portion of the smokeshop income allocable to the trust land or a portion of the smokeshop income allocable to the trust land itself. As the Court of Appeals for the Ninth Circuit stated in Stevens v. Commissioner, 452 F.2d 741, 744 (1971):

Capoeman is not a technical or narrow decision; nor is its holding limited to capital gains taxes. Rather the Court found implicit in Section 5 and the amendment to Section 6 of the General Allotment Act a "congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee." 351 U.S. at 8, 76 S. Ct. at 616. [Footnote 7 omitted.]

The "derived directly" test was not newly minted in the Supreme Court's 1956 Squire v. Capoeman decision but came instead with acknowledged historical antecedents. 4/

4 See Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), where the court pointed out (452 F.2d at 744n. 7) that:

The majority's narrow limitation of Squire v. Coplanar is unfaithful to the purpose and historical source of the "derived directly" test. In articulating the test, the Supreme Court relied upon a treatise by the noted Indian law expert, Felix S. Cohen. See Cohen, Handbook of Federal Indian Law 265-266 (1941). Cohen had taken the phrase from an early Solicitor's Memorandum. See S.M. 5632, V-1 C.B. 193, 196 (1926). There the Solicitor's Memorandum, discussing Indian allottees under the Act of May 8, 1906, 34 Stat. 182, stated:

These provisions clearly indicate that before the issuance of a fee simple patent such restricted land is exempt from taxation, it follows that income directly

Footnote 4 continued

The [Supreme] Court also quoted with approval from Cohen, Handbook of Federal Indian Law, 265, where "Felix S. Cohen, an acknowledged expert in Indian Law," said "that it is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." The Court noted also that Mr. Cohen "distinguished cases permitting the imposition of income taxes upon income derived from unrestricted lands, and upon reinvestment income." 351 U.S. at 8-9, 76 S. Ct. at 616.

derived from such land is also exempt.

See also T.D. 3570, III-1 C.B. 85 (1924) and T.D. 3754, IV-2 C.B. 37 (1925), both Opinions of the Attorney General adopted as Treasury decisions and cited with approval by the Supreme Court in Squire v. Capoeman, supra, 351 U.S. at 8. These rulings, in turn, all relied on the landmark case of Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 581 (1895), vacated on other grounds 158 U.S. 601 (1895), holding, inter alia, that a tax on the rental income from real estate was a direct tax on the land. See also Bagby v. United States, 60 F.2d 80, 81 (10th Cir. 1932). Similarly, the predecessor of this Court recognized as early as 1928 that where the Indian allottee's land is tax exempt, the income from that land is also tax exempt. Snell v. Commissioner, 10 B.T.A. 1081 (1928). That case pointed out that while the income from that land is also tax exempt. Snell v. Commissioner, 10 B.T.A. 1081 (1928). That case

pointed out that while the income from the land was tax exempt, the income from reinvesting that tax-exempt income (so-called "reinvestment income") was not.

The purpose of the Supreme Court's "derived directly" test in Squire v. Capoeman, supra, was not to narrowly circumscribe the types of income that could be considered as directly derived from the land. Rather, the purpose was "to distinguish the Court's holding in Five Civilized Tribes, 5/ sustaining taxability of income derived from investment of the proceeds of surplus income from allotted Indian land, or 'reinvestment income.' . . ." Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) Michie, Bobbs-Merrill, ch. 7, sec. B3, 397. See also Cohen, Handbook of Federal Indian Law, 266 (1941); Squire v. Capoeman, supra, 351 U.S. at 9; Snell v. Commissioner, supra.

5 Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935).

While Snell involved income from cutting timber, neither opinion restricts the types of income that can be considered as directly derived from the trust land nor superimposes any additional test of "exploitation" involving a diminution of the value of the trust land, as the majority suggests. For example, income from farming and ranching operations on trust lands is tax exempt to the individual Indian allottee on whose trust land such operations are conducted. Stevens v. Commissioner, supra. Farming and ranching, unless improperly conducted, do not damage or diminish the value of the trust land. See also United States v. Daney, 370 F.2d 791 (10th Cir. 1966), where the income from oil and gas produced and any royalty interests in oil and gas produced were taxable to the Indians under the particular act before the Court. However, the trust land in that case was still subject to the Squire v. Capoeman exemption, and the Court of Appeals for the

Tenth Circuit held that the lease bonus was still income derived directly from the trust land and was still tax exempt. Citing Bagby v. United States, supra (which in turn relied on Pollock v. Farmers' Loan & Trust Co., supra), the Tenth Circuit said that a tax on such a lease bonus was in substance a tax on the land. And it must be remembered that the very type of income involved in Pollock v. Farmers' Loan & Trust Co., supra, was rental income from the land.

I therefore conclude that rental income from trust land is tax exempt to the individual Indian allottee under Squire v. Capoeman, supra. See also United States v. Hallam, 304 F.2d 620 (10th Cir. 1962), which held that rental income from trust land (among other types of income) was exempt under the Squire v. Capoeman "derived directly" test. See also Rev. Rul. 56-342, 1956-2 C.B. 20.

Accordingly, I also must respectfully disagree with the contrary holding of the

Federal District Court in Hale v. United States, 579 F. Supp. 646 (E.D. Wash. 1984), on appeal (9th Cir. March 8, 1984), which the majority cites and quotes with approval. The Hale case involved the Indian owner-lessor of allotted land, apparently the same land leased by Mr. Hoptowit, the taxpayer in our smokeshop case of Hoptowit v. Commissioner, 78 T.C. 137 (1982), affd, on a related issue 709 F. 2d 564 (9th Cir. 1983). Mr. Hale's land was held in trust for him by the United States under the General Allotment Act of 1887 just as Mr. Cross's land was. The Federal District Court agreed that income directly derived from such trust land was exempt from Federal income tax under Squire v. Capoeman, but held that the rental income was not derived directly from the land.

I think the Hale court, like the majority here, ignores the purpose and historical source of the "derived directly" test. In my view, the Hale court fell into the same error as the

majority in this case by attempting to superimpose an "exploitative" diminution of value test onto Squire v. Capoeman "derived directly" test.^{6/} Rental income, in my opinion, is one of the clearest types of income directly derived from trust land.

Accepting, as I do, that actual rental income from trust land is exempt to the individual Indian allottee under Squire v. Capoeman, supra, I think there is no sound basis for treating differently the income of a noncompetent Indian from activities he himself conducts on his allotted land, to the extent that such income is attributable to the trust land itself rather than to the improvements,

⁶ I do not suggest that Squire v. Capoeman, supra, exempts the income from the individual Indian allottee's improvements on his trust land. The Court of Appeals for the Ninth Circuit in United States v. Anderson, supra, 625 F.2d at 913 n. 3, has drawn a distinction between income from a "non-land-based" business conducted on trust lands, such as a law practice, which is taxable, and income from other presumably "land-based" operations on trust land, which are not taxable.

inventory, or personal services. See footnote 6. In both situations, a tax on the income derived from the land would be a direct tax upon the land itself within the meaning of Pollock v. Farmers' Loan & Trust Co., supra. I think that the suggestion of the Court of Claims (now the Court of Appeals for the Federal Circuit) in Critzer v. United States, 220 Ct. Cl. 43, 597 F.2d 708, 714 (1979), which the majority rejects, is the proper approach. See Maj. Op. at footnote 10.

Contrary to the statement in the majority opinion and in Judge Chabot's concurring opinion, I am not in any way imputing income to Mr. Cross from his own use of his own land. I am not creating imputed income where no income exists. Rather, I am suggesting the use of the fair rental value of Mr. Cross's unimproved trust land, which has been stipulated by the parties, as an appropriate measure of the extent to which his smokeshop income is attributable to the raw land itself, and thus exempt from tax

under Squire v. Capoeman, supra, as income derived directly from his trust land. An allocation of income among its various sources is hardly unprecedented in Federal tax law, nor even in applying the exemption of Squire v. Capoeman, supra. See Rev. Rul. 60-377, 1960-2 C.B. 13, modified by Rev. Rul. 62-16, 1962-1 C.B. 7. The "difficult computational and valuation problems" prophesied by the majority, in my opinion, pose no threat and simply come within the usual fact-finding chores of a trial court.

Indian-taxpayers have hardly advanced their cause by persisting in their untenable claim to a general exemption from Federal income taxes simply because they are Indians. See Maj. Op. at footnote 9. See also footnote 2 to this dissenting opinion. While the scope of the Squire v. Capoeman exemption is not nearly as broad as the Indian claimants in this and other courts have contended over the years,

nonetheless, it is not as narrow and restrictive as the majority opinion holds. In its proper sphere, where an individual Indian allottee conducting operations on his own trust land directly derives income from the land itself, that income is tax exempt. I think rental income or the portion of the smokeshop income allocable to the raw land itself is within the Squire v. Capoeman exemption.

FAY, KORNER, STERRETT, and WHITAKER, JJ., agree with this dissent.

APPENDIX G

DEPT. OF INTERIOR LTR. OF
MAY 6, 1873,
AND
"TREATY BACKGROUND" (Findings 15 & 16)
EXCERPT FROM U.S. EX REL CERTAIN
INDIAN TRIBES v. WASHINGTON,
384 F. SUPP. 312, 354 & 355 (1974)

May 6th 1873

Sir:

I have received your letter of the 5th _____, asking whether there is any law authorizing an Indian to dissolve his tribal relations and become a citizen of the United States without doing so through the Homestead and Preemption Laws, and also requesting to be informed of the date of the Act of Congress granting the homestead and preemption privileges to Indians.

In reply you are advised that there is no existing law of general application providing for the dissolution by an individual Indian of his tribal relations, and permitting him to become a citizen of the United States. Neither

is there any Act of Congress specifically granting to Indians the homestead and preemption privilege.

The clause referred to by you in the instructions issued by the general law office, stating that Indians are entitled to said privilege, was inserted pursuant to a decision of the Hon. J.D. Cox late Secretary of the Interior, under date of February 11, 1870, in reply to a letter from the Commissioner of the general law office, being date January 4, 1870. Copies of these letters are enclosed herewith for your information.

The action of this Department is still governed by said decision, the same never having been reversed.

You cannot give Indians who may make application, certificates of citizenship, but you can certify that they have voluntarily abandoned their tribal relations, and under the present _____ of the Department they can then avail themselves of the homestead and preemption

privileges.

No form of certificate of citizenship accompanied your letter as therein stated.

Very respectfully,

Your obt. servant,

E.P. Smith
Commissioner

TREATY BACKGROUND

[U.S.C. v. Washington 384 F.
Supp 312, 353 and 354 (1974)]

15. the United States claimed the area now embraced within the State of Washington by discovery and settlement and by the treaty extinguishment of conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), Russia (Convention of April 17, 1824, 8 Stat. 302), and Great Britain (Treaty of June 15, 1846, 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so

long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *." Section 14 of that act extended to the Oregon Territory the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which provides that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent." By an Act of June 5, 1850, 9 Stat. 437, Congress authorized the negotiation of treaties with the Indian tribes in the Oregon Territory (which then included the area which now comprises the State of Washington) for extinguishing their claims to land lying west of the Cascade Mountains. By the Act of March 2, 1853, 10 Stat. 172, Congress organized the Washington Territory out of part of the Oregon Territory (including all of the present State of Washington) and provided that nothing in said act shall affect the authority of the United States to "make any regulations respecting the

Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise," which the Government could make if that act had never been passed. All federal laws relating to the Oregon Territory not inconsistent with the 1853 Act were expressly continued in force in Washington Territory. Section 2 of the Act provided for appointment of a governor who was also to perform the duties of Superintendent of Indian Affairs in the Territory. The Appropriation Act of March 3, 1853, 10 Stat. 226, 238, authorized the President to negotiate with Indian tribes west of Missouri and Iowa "for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands; * * *." The Appropriation Act of July 31, 1854, 10 Stat. 315, 330, authorized the use of appropriations for making treaties in several

territories, including Washington, prior to July 1, 1855. [FPTO 3-28]

16. The Act of February 22, 1889, 25 Stat. 676, admitting Washington to statehood, provided as a precondition to such statehood, that the people of the state forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and shall remain under the absolute jurisdiction and control of Congress. Washington accepted this requirement and incorporated it into Article XXVI of the State Constitution. Washington was admitted into the Union as a state on November 11, 1889. 26 Stat. Proclamation no. 8. [FPTO 3-29]

APPENDIX H

CONFLICTING OPINIONS

U.S. v. Daney, 370 F.2d 791

(10th Cir. 1966)

Daney v. U.S.A. 247 F. Supp. 533

(1965)

and

U.S. Court of Appeals Mandate

UNITED STATES of America,

Appellant,

v.

Joseph DANEY and Berth Daney,

Appellees.

No. 8687.

United States Court of Appeals

Tenth Circuit.

Dec. 27, 1966

Action .to recover income taxes paid. The United States District Court for the District of Kansas, Wesley E. Brown, J., 247 F.Supp. 533, entered judgment for plaintiffs and government appealed. The Court of Appeals, Hill, Circuit Judge, held that 1928 statute providing that all minerals, including oil and gas, produced on or after April 26, 1931 from restricted allotted lands of members of Five Civilized Tribes of

Oklahoma should be subject to all state and federal taxes of every kind and character the same as those produced from land owned by other citizens of state was limited in application to royalties received on production and did not subject noncompetent, restricted, Choctaw Indian tax on bonus given to him upon execution of oil and gas lease upon his allotted restricted land.

Affirmed.

1. Internal Revenue 181

Where 1947 statute provided that tax exempt lands owned by Indian of Five Civilized Tribes in Oklahoma on date thereof should continue to be tax-exempt in hands of such Indian during restricted period, 1955 act extended period of restrictions for lives of Indians owning such lands and provided that nothing therein should be construed to repeal or limit application of 1947 statute, tax exemption allowed under 1947 act was made applicable to period of restrictions extended for period of life of

noncompetent restricted full-blood Choctaw
Indian who had been allotted land in Choctaw and
Chickasaw Nations Indian Territory. Act of Aug.
4, 1947, c. 458, 61 Stat. 731; Act of Aug. 11,
1955, c. 786, 69 Stat. 666.

2. Internal Revenue 800

Tax on Indian allottee's bonus for
execution of oil and gas lease upon his allotted
land was in substance a tax on the land and,
inasmuch as land was tax exempt, bonus was also
tax exempt and was improperly assessed. Act of
Aug. 4, 1947 c. 458, 61 Stat. 731; Act of Aug.
11, 1955, c. 786, 69 Stat. 666.

3. Licenses 19(3)

1928 act providing that all minerals,
including oil and gas, produced on or after
April 26, 1931 from restricted allotted lands of
members of Five Civilized Tribes in Oklahoma
should be subject to all state and federal taxes
of every kind and character the same as those
produced from lands owned by other citizens of
state had as its main purpose enabling state to

collect a gross production tax on oil and gas produced on restricted Indian allotments. Act of May 10, 1928, c. 517, 45 Stat. 495 and 3 as amended.

4. Internal Revenue 800

1928 statute providing that all minerals, including oil and gas, produced on or after April 26, 1931 from restricted allotted lands of members of Five Civilized Tribes of Oklahoma should be subject to all state and federal taxes of every kind and character the same as those produced from land owned by other citizens of state of Oklahoma was limited in application to royalties received on production and did not subject noncompetent, restricted Choctaw Indian to tax on bonus given him upon execution of oil and gas lease upon his allotted restricted land. Act of May 10, 1928, c. 517, 45 Stat. 495 and 3 as amended; Act of Aug. 4, 1947, c. 458, 61 Stat. 731; Act of Aug. 11, 1955, c. 786, 69 Stat. 666.

5. Indians 13(1)

Allotment system with respect to Indian lands has had as its purpose the protection of Indians' interest and preparation of Indians to take their place as independent, qualified members of modern body politic.

Jack S. Levin, Washington, D.C. (Mitchell Rogovin, Asst. Atty. Gen., Meyer Rothwacks, Melva M. Graney, and Thomas L. Stapleton, Attorneys, Department of Justice, on the brief), for appellant.

John Claro and Bert Barefoot, Jr., of Barefoot, Moler, Bohanon & Barth, Oklahoma City, Okl., for appellees.

Before PICKETT and HILL, Circuit Judges, and CHILSON, District Judge.

HILL, Circuit Judge.

Appellees, in the court below, sued to recover \$18,114.89 as a refund of income tax they alleged the government had illegally and erroneously collected from them. The District

Court gave judgment to appellees and the government takes this appeal.

Up to and including the year 1958, Joseph Daney 1/ was a noncompetent, restricted full-blood Choctaw Indian. In 1903 he had been allotted 120 acres of land in the Choctaw and Chickasaw Nations Indian Territory. In 1929, this land was designated by him and the United States Department of the Interior as tax exempt in accordance with and subject to the terms of the Act of May 10, 1928, Ch. 517, 45 Stat. 495. The Act of January 27, 1933, Ch. 23, 47 Stat. 777, extended the tax exemption to other Indian funds and securities but provided expressly that oil and gas produced from the land was subject to State and Federal taxes as provided by Section 3 of the Act of May 10, 1928. Section 3 of the Act of May 10, 1928, 2/ in pertinent part

1 Betha Daney, wife of Joseph Daney, is a party to the lawsuit only because the Daneys filed a joint return for that calendar year 1958.

2 Section 3 of the Act of May 10, 1928, was Footnote continued on next page.

provides: "* * * all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands [which included the 120 acres with which we are here concerned] of members of the Five Civilized Tribes in Oklahoma * * * shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production."

In 1958 Daney received \$61,333.20 from an

Footnote 2 continued.

amended by the Act of February 14, 1931, Ch. 179, 46 Stat. 1108, and by the Act of March 12, 1936, Ch. 138, 49 Stat. 1160, but the language we are dealing with was not changed.

oil company as a lease bonus upon the execution by him of an oil and gas lease upon his allotted land. On his federal income tax return for 1958 appellee listed the amount of the bonus so received less 27 1/2 percent depletion allowance and expenses, plus \$150 received in 1958 as a delay rental under the lease, or \$44,472.57 as "advance royalty" and "rental" income. Thereafter, appellee filed a claim for refund in the amount of \$18,114.57, the full amount of the taxes which had been paid on the lease bonus income and the delay rental. This claim was disallowed. Daney brought suit for the refund and was given judgment for "the principal amount of \$18,114.89, plus interest, wrongly assessed and collected for the calendar year 1958." This appeal is limited to the question of the income taxability of the lease bonus.

A threshold issue we have to decide is whether or not Daney's land enjoyed any tax exempt status during the taxable year 1958. The

government's contention is that it did not. We cannot agree.

[1] The Act of May 10, 1928, provided that the tax exemptions on land should not extend beyond the period of restrictions which were to end on April 26, 1956, under the terms of the Act. The Act of August 4, 1947, Ch. 458, 61 Stat. 731, 6(b) provided that:

"All tax exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period * * *." (Emphasis ours.)

The Act of August 11, 1955, Ch. 786, 69 Stat. 666, extended the period of restrictions on appellee's land by providing as follows:

"* * * the period of restrictions * * * which period was extended to April 26, 1956, by the Act of May 10, 1928 (45 Stat. 495), is hereby extended for the lives of the Indians who own such lands subject to such restrictions on the date of this Act."

Section 4 of the 1955 Act specifically provided that, subject to exceptions not here pertinent, "nothing in this Act shall be construed to repeal or to limit the application of the Act of

August 4, 1947 * * *." By this clause, the tax exemption allowed under the Act of 1947, i.e., "during the restricted period", is made applicable to the period of restrictions extended for the period of Daney's life by the Act of 1955. Thus we conclude that the lands with which we are here concerned were tax exempt during the taxable year 1958.

[2] As this court has said, a lease bonus such as that received by Daney is not the restricted land itself, but a tax on such a bonus is in substance a tax on the land. Bagby v. United States, 10 Cir., 60 F.2d 80; Pitman v. Commissioner of Internal Revenue, 10 Cir., 64 F.2d 740, 743; Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883. Because in the taxable year 1958 the land was tax exempt, the bonus was also tax exempt unless Congress intended by the Act of May 10, 1928, set out above, to subject it to income tax. The government's position is that the cash bonus

paid to the appellee for his execution of the oil and gas lease is an advance royalty and is to be treated like other royalties and, in accordance with the statute, subjected to income tax, with a 27 1/2 percent allowance for depletion. In urging this position, the government says that it "is firmly established in the federal tax law that a cash bonus paid to a lessor in connection with the execution of an oil and gas lease is considered an advance royalty" and that "for federal tax purposes * * * a bonus has always been considered as production income, i.e., income derived by the lessor in contemplation of production." The cases relied upon by the government do treat a lease bonus as an advance royalty and, hence, ordinary income. However, those cases have all addressed themselves to issues entirely different than that with which we are faced.^{3/}

³ Those cases and the pertinent issues involved in them are:

Anderson v. Helvering, 310 U.S. 404, 60 S.Ct. 952, 84 L.Ed. 1277 (Involved the question Continued on next page.

[3] None of those cases help us to construe section three of the Act of May 10, 1928, to determine if, by that statute, Congress intended to change the previously tax-exempt status of lease bonuses. During oral argument leave was granted to appellee to file an addendum setting forth excerpts of the legislative history of the Act of May 10, 1928. That history reveals that the main purpose of

Footnote 3 continued.

of to whom income from an oil and gas lease is taxable.); Thomas v. Perkins, 301 U.S. 655, 57 S.Ct. 911, 81 L.Ed. 1324 (Should lease assignee-taxpayer's gross income include moneys paid to assignors by purchasers of oil?); Palmer v. Bender, 287 U.S. 551, 53 S.Ct. 225, 77 L.Ed. 489 (Could taxpayer take 27 1/2 percent depletion allowance from income derived from oil property?); Murphy Oil Company v. Burnet, 287 U.S. 299, 53 S.Ct. 161, 77 L.Ed. 318 (Involved the question of the correct calculation for deduction of depletion where Court found a lease bonus previously received was a return of capital.); Burnet v. Harmel, 287 U.S. 103, 53 S.Ct. 74, 77 L.Ed. 199 and Bankers' Pocahontas Coal Co. v. Burnet, 287 U.S. 308 53 S.Ct. 150, 77 L.Ed. 325 (Is a lease bonus to be treated as capital gain or ordinary income?); United States v. White, 10 Cir., 311 F.2d 399 (did the transfer of mineral interests amount to a sale and thus require payment therefor to be treated as capital gain?); Sunray Oil Co. v. Commissioner of Internal Revenue, 10 Cir., 147

Footnote continued on next page.

section three was to enable the State of Oklahoma to collect a gross production tax on the oil and gas produced on restricted Indian allotments. Prior to the enactment of section three of the statute, Oklahoma could not tax the income derived from mineral leases upon restricted Indian lands because the Supreme Court had held that the lessees, the mineral

Footnote 3 continued.

F.2d 962. (Could lessee deduct from his gross income for a taxable year that portion of lease bonuses allocable to that year?).

The only case cited by the government which involved special Indian legislation is Work v. United States ex rel. Mosier, 261 U.S. 352, 43 S.Ct. 389, 67 L.Ed. 693. In that case, the Supreme Court was concerned with the proper distribution of Osage tribal income under a 1906 statute; and it was according to the terms of that distribution statute the Court was compelled to say (358, 43 S.Ct. 391):

"What was intended to be distributed to the members of the tribe was the income from the mineral deposits in their lands, and the bonus was part of that. Doubtless Congress had in mind regular annual or quarterly equal payments when it used the word 'royalties' and did not anticipate such large down payments. But in the unexpected event, we must decide under what head the bonus is to be treated, whether as capital or income, and it seems clear to us that, in view of the entire statute, it is more aptly described by the latter term."

producers, were acting as instrumentalities of the United States Government and, therefore, the income they derived by virtue of their leases upon the restricted lands could not be taxes. 4/ Section three was included within the Act to enable the collection by Oklahoma of a gross production tax upon the minerals produced from the Indian lands. That is why the Act refers to "minerals * * * produced" and "royalty interest * * * in such oil, and gas and other mineral production." (Emphasis added)

[4,5] The government makes much of the fact that, under the Act, an Indian's "minerals, including oil and gas, produced" shall be taxed "the same as those produced from lands owned by other citizens of the State of Oklahoma * * *." In view of this language, says the government, the lease bonus must be taxable income since: "The ordinary citizen pays income taxes at

4 See Gillespie v. State of Oklahoma, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922). Gillespie was subsequently overruled by Helvering v. Mountain Producers Corp., 303 U.S. 376, 58 S.Ct. 623, 82 L.Ed. 907 (1938).

ordinary rates on a lease bonus because such bonus has been held under long standing Supreme Court decisions to be in the nature of an advance royalty payment to the lessor."5/ This misses the mark. We are not dealing with an ordinary citizen. We are dealing with a non-competent, restricted Choctaw Indian who, in 1958, was living on his allotted, restricted land. This Indian's lease bonus is taxable if and only if the Act of 1928 says it is. It is true that section three did and does subject to all State and Federal taxes any true production royalty which an Indian received from production on his restricted land. But it goes no further than that. It does not say that, under the "ordinary" rules of taxation, a lease bonus is to be treated as an advance royalty. The clear language and the history of the statute limit its application to royalties received on production. The government also says that:

5 Brief for Appellant, p.11

"Having made the initial decision to tax all minerals including oil and gas on the allotted lands, it is not fairly to be assumed that Congress thereafter intended one set of tax rules for the Indians and another, at variance with the latter, for ordinary citizens." We do not agree. Congress did accord to the Indians a different set of rules of taxation. The language of the statute purports to put Indians and other citizens of Oklahoma on equal footing only as regards minerals produced. The Indians still enjoy the special tax advantage as to other income from the allotted, restricted lands. That advantage must be preserved to carry out the Congressional purpose behind the allotment system which "was to protect the Indians' interest and °to prepare the Indians to take their place as independent, qualified members of the modern body politic.'" 6/ It may

6 Squire v. Capoeman, 351 U.S. 1, at page 9, 76 S.Ct. 611, at page 616, quoting from Board of Commissioners of Creek County v. Seber, 318 U.S. 705, 715, 63 S.Ct. 920, 87 L.Ed. 1094.

be said that there no longer exists any need to give the restricted Indian a tax advantage, that he has become an independent, qualified member of the modern body politic, and, indeed, that all the "ordinary" tax principles should be applicable to him. It is for Congress to make that determination and change the Act of May 10, 1928. This court cannot.

Affirmed.

Joseph DANEY and Bertha Daney,
Plaintiffs,

v.

UNITED STATES of America,
Defendants.
Civ. A. No. W-3046.

United States District Court
D. Kansas.
Oct. 12, 1965.

Action to recover income tax paid. The District Court, Wesley E. Brown, J., held that cash bonus paid to noncompetent, restricted Choctaw Indian for execution of oil and gas lease on restricted land was tax exempt.

Judgment for plaintiffs.

1. Internal Revenue 1970

Under general tax law, statute of limitations on filing of income tax refund is normally jurisdictional prerequisite.

2. Internal Revenue 181

General rules of tax law, like general acts of Congress, do not apply to restricted Indian in strict manner.

3. Limitation of Actions 70(1)

Noncompetency of Indian tolls statute of limitations.

4. Internal Revenue 1970

Three-year limitation on filing of income tax refund claims did not commence, in case of taxpayer who had been noncompetent restricted Indian at time of payment, until after removal of noncompetence restriction.

5. Internal Revenue 287, 409.10, 727

For general tax purposes, cash bonus for execution of oil and gas lease is treated as

advance royalty in hands of lessor, and is taxable as ordinary income in year received or accrued and is subject to reasonable allowance for depletion.

6. Internal Revenue 183

In the ordinary tax case, tax exemptions must be clearly expressed and are not to be found or granted by implication.

7. Indians 5

General acts of Congress do not apply to Indians unless so expressed as to clearly manifest intent to include them.

8. Internal Revenue 800

Special Indian tax statutes must be passed by Congress in order to impose tax liability on Indian income.

9. Internal Revenue 183

Tax exemptions are found by implication in Indian tax cases.

10. Indians 6

All Indian statutes are to be liberally construed.

11. Internal Revenue 181

Indian tax cases should recognize guardian-ward relation between government and noncompetent Indian and Congressional policy regarding Indians; it is not lightly to be assumed that Congress intended to tax ward for benefit of guardian.

12. Internal Revenue 800

Tax exempt status accorded to restricted Indian land extends to income derived directly therefrom.

13. Mines and Minerals 73, 79(1)

A "royalty" is a share of production, or share of product or proceeds therefrom, while "cash bonus" is consideration paid for execution of oil and gas lease.

14. Internal Revenue 800

Cash bonus paid to noncompetent, restricted Choctaw Indian for execution of oil and gas lease on restricted land was tax exempt. Act June 28, 1898, 30 Stat. 495; Act Apr. 26, 1906,

34 Stat. 137; Act May 10, 1928, 3, 45 Stat. 495; Act Feb. 14, 1931, 46 Stat. 1108; Act Mar. 12, 1936, 49 Stat. 1160; Act Jan. 27, 1933, 1, 47 Stat. 777; Act Aug. 4, 1947, 12, 61 Stat. 731; Act Aug. 11, 1955, 69 Stat. 666.

Barefoot, Moler, Bohanon & Barth, Oklahoma City, Okl., and Cooper, Esco, Cooper & Loyd, Wichita, Kan., for plaintiffs.

Newell A. George, U.S. Dist. Atty., Topeka, Kan., Louis F. Oberdorfer, Asst. Atty. Gen., Giora Ben-Horin, C. MOXLEY Featherston, and Jerome Fink, Trial Section, Tax Div., Dept. of Justice, Washington, D.C., for defendants.

WESLEY E. BROWN, District Judge

This is a civil suit brought to recover a sum certain, plus interest, alleged to have been wrongly taxed and collected by defendant on income received in 1958 by plaintiff Joseph Daney in the form of a cash bonus paid for the execution of an oil and gas lease. Plaintiff Bertha Daney is a party to this suit only

because the Daneys filed a joint return for the calendar year 1958. The transaction involved occurred in 1958; at that time and at all pertinent times, plaintiff Joseph Daney was a noncompetent, restricted, full-blooded Choctaw Indian No. 6206. The Choctaws, of course, are one of the "Five Civilized Tribes" [composed of the Creek, Choctaw, Chicasaw, Cherokee and Seminole].

This matter is currently before the court for determination on a stipulated fact pattern. the stipulated facts are approved and adopted by the court and will not be set out here except as necessary to clarify our views.

The parties have also stipulated that the two questions of law to be determined by the court are as follows:

(a) whether plaintiffs are barred from recovery by virtue of their failure to timely file a refund claim at the office of the appropriate District Director of Revenue;

(b) whether the income realized in 1958 by plaintiff Joseph Daney [hereinafter referred to as "plaintiff" or "taxpayer" or "Daney"] from an oil and gas lease executed on his allotted Indian land is subject to federal income tax.

STATUTE OF LIMITATIONS
ISSUE

It is stipulated that plaintiffs filed a timely joint tax return for the calendar year 1958 with the District Director of Internal Revenue at Wichita, Kansas, reporting a tax liability of \$18,794.53. Only \$18,114.89 of the tax liability is attributable to the oil and gas lease transaction and this is the principal sum involved herein. The tax liability was paid. It is also stipulated that the tax return was prepared by the Indian Office in Muskogee, Oklahoma, and the tax liability was paid by the Indian Office out of the restricted funds of the taxpayer.

It is further stipulated that plaintiffs filed their claim for refund in 1962 and that it

was received in the Ardmore, Oklahoma office of the District Director of Revenue, Oklahoma City, on April 16, 1962 and at the Wichita Office on May 14, 1962. April 15, 1962 fell on a Sunday.

It is conceded by both sides to this suit that the refund claim was timely filed in Oklahoma, since April 15, 1962 was a Sunday. Defendant contends, however, that it was not timely filed at Wichita, and relies on Treas. Reg. 301-6402-2(a) (2), which requires the refund claim to be filed in the office of the district director for the district in which the tax was paid.

[1,2] Under general tax law, this statute of limitations requirement is normally a jurisdictional prerequisite. See, e.g., 10 Mertens, Federal Income Tax 58A.06 (1960). But general rules of tax law, like general acts of Congress, do not apply to restricted Indians in such a strict manner. See, e.g., Blackbird v. Commissioner, 38 F.2d 976 (10th Cir. 1930). Cf. Big Eagle v. United States, 300 F.2d 765, 156

Ct. Cl. 665 (1962).

[3,4] Judge Rizley of the Western District of Oklahoma has recently ruled that a refund claim can be filed by a restricted Indian at any time. Nash v. Wiseman, 227 F.Supp. 552 (W.D. Okl. 1963). See also 10 Mertens, Federal Income Tax 58A.06n. 54 (1960). In other words, the noncompetency of an Indian tolls the applicability of the statutes of limitations. In the case at bar, Daney was no longer a noncompetent at the time he filed his refund claim, but he had been a noncompetent Indian during all of 1958, and the restrictions on his land were not removed until October 21, 1959 [Stipulation, 7]. We are therefore of the opinion that the running of the three-year period for the filing of refund claims did not commence until after Daney's noncompetence restrictions were removed. Thus the filing of the refund claim in Wichita was timely made; and plaintiffs' claim for refund is not barred by

the statute of limitations assuming arguendo that Treas. Reg. 301. 6402-2(a) (2) applies to restricted Indians.

We would add that Rev.Rul. 61-11, 1961-1 Cum.Bull. 724 permits the allowance of a claim for refund notwithstanding the expiration of the statute of limitations for taxes wrongly assessed and collected "on tax-exempt income directly derived from allotted and restricted Indian lands." Defendant seems to concede that should we rule in favor of plaintiffs on the merits, defendant's statute of limitations argument must also fall. See Brief for Defendant, p.21.

THE MERITS OF PLAINTIFFS'
CLAIM FOR REFUND

It is stipulated that the land here involved was allotted to Daney by Patent No. 2493 dated July 17, 1903 and recorded December 22, 1924; that by Certificate No. 324 of June 10, 1929 the land involved was designated by taxpayer and the Department of Interior as tax

exempt as long as title remained in Daney, such tax exemption not to extend beyond April 26, 1956; that by 1 of ch. 786 of P.L. 348 enacted on August 11, 1955, 69 Stat. 666, the restrictions on lands held by members of the five Civilized Tribes which were to expire to April 26, 1956 were extended for the lives of the Indians. It is further stipulated that the restrictions on Daney's land were removed by Order No. 58 on October 21, 1959.

[5] We are met from the outset by several sets of competing principles. On the one hand, under the "general rules" applicable to the tax code, and applicable to "ordinary tax cases," it is well settled that a cash bonus paid for the execution of an oil and gas lease is "treated as" advance royalty in the hands of the lessor, and the bonus is taxable as ordinary income in the year received or accrued and is subject to a reasonable allowance for depletion. E.g., 4 Mertens, Federal Income Tax 24.63 (1960); Burnet v. Harmel, 287 U.S. 103, 53 S.Ct. 74, 77

L.Ed. 199 (1932); Shamrock Oil & Gas Corp., 35 T.C. 979, 1040 (1961).

[6] Further, as to the "ordinary tax case," under the tax code, tax exemptions must be clearly expressed and are not to be found or granted by implication. E.g., Big Eagle v. United States, 300 F.2d 765, 769, 156 Ct. Cl. 665 (1962).

[7] Bluntly, if the "general rules" apply to Daney he would be required to pay the tax to support the government which protects him, but general acts of Congress do not apply to Indians unless so expressed as to clearly manifest an intent to include them. E.g., Elk v. Wilkens, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884); Blackbird v. Commissioner, 38 F.2d 976 (10th Cir. 1930). Blackbird, Chouteau v. Commissioner, and Petitt v. Commissioner were companion cases in the Tenth Circuit and were decided under the same citation. Chouteau was a competent Osage; Petitt was a white woman who

had inherited land from her children who were Osage tribe members and Blackbird was a noncompetent Osage. The circuit court upheld taxability as to Chouteau and Petitt; denied taxability as to Blackbird. On review, the Supreme Court affirmed Chouteau but did not review Petitt or Blackbird. See Chouteau v. Burnet, 283 U.S. 691, 51 S.Ct. 598, 75 L.Ed. 1353 (1931). In the circuit case the spelling was "Chouteau," but the circuit case and the Supreme Court case clearly involved the same Indian.

[8] The Internal Revenue Codes of 1926, 1928, 1932, 1934, 1939 and 1954 made no specific reference to income taxation of noncompetent Indians. See Freeman P. Walker, 37 T.C. 962, 968-969 (1962). We therefore must conclude that special "Indian tax statutes" must be passed by Congress in order to impose tax liability on Indian income.

[9] And while tax exemptions are to be strictly construed under the "general rules,"

the rule is just the opposite as applied to Indians: tax exemptions are found by implication in Indian tax cases. E.g., United States v. Hoffman, 306 F.2d 493 (10th Cir. 1962) (per curiam); United States v. Hallam, 304 F.2d 620 (10th Cir. 1962).

[10] Further , all Indian statutes are to be liberally construed:

"The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases." Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941, 946 (1912).

[11] The tax cases involving restricted, noncompetent Indians are not to be analyzed as "ordinary tax cases." E.g., Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956). Indian tax cases are to give recognition to the guardian-ward relationship between the government and the noncompetent Indian and to

the Congressional policy regarding Indians. "[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." Squire v. Capoeman, supra, 351 U.S. at 8, 76 S.Ct. at 616, 100 L.Ed. at 890.

Additionally, the Interior Department's publication on Federal Indian Law (1958) states at page 882 that in Squire the Supreme Court reverted to a policy of liberal construction in applying revenue laws to Indians. See Freeman P. Walker, 37 T.C. 962, 970 (1962).

[12] It must also be noted that as applied to Indians, a tax exempt status accorded to restricted land extends to the income derived directly therefrom. Cohen, Handbook of Federal Indian Law 265, cited with approval, Squire v. Capoeman, supra, 351 U.S. at 9 n. 15, 76 S.Ct. 611, 100 L.Ed. at 890 n. 15. We must further mention two corollaries of this proposition. Indian tax cases involving income from unrestricted land or competent Indians [E.g.,

Choteau v. Burnet, 283 U.S. 691, 51 S.Ct. 598, 75 L.Ed. 1353 (1931) (up from the Tenth Circuit) and a companion case to Blackbird], and cases involving reinvestment income taxation (income on income) [E.g., Superintendent of Five Civilized Tribes for Sandy Fox, Creek No. 1263 v. Commissioner, 295 U.S. 418, 55 S.Ct. 820, 79 L.Ed. 1517 (1935) (up from the Tenth Circuit and commonly cited as the Sandy Fox case)], have no application to the facts at bar. The land involved at bar was at pertinent times restricted land and Daney was a noncompetent ward of defendant.

Congress spoke regarding the taxability of Choctaw income in several special statutes, only some of which will be summarized here.

As background, the basic agreement with the Five Civilized Tribes was the Atoka agreement, embodied later in the Curtis Act. This act (Act of June 28, 1898 [30 Stat. 495]) provided that

"All that lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-

one years from the date of patent * * *."

The period of restrictions on the land was later extended and re-extended.

The Act of April 26, 1906 (34 Stat. 137) continued the restrictions on any land allotted to a full-blooded member of the Five Civilized Tribes and stated:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as title remains in the original allottee." (emphasis added).

In Section 3 of the Act of May 10, 1928 (45 Stat. 495), Congress stated:

"That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes of Oklahoma, * * * shall be subject to all * * * Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, * * * the tax or taxes so assessed against the royalty interest * * * in such oil, gas, and other mineral production." (emphasis added)

This section was amended by the Act of February 14, 1931 (46 Stat. 1108) to add a

provision against double taxation not here import-and the part of Section 3 quoted above was re-enacted verbatim. Section 3 was again re-enacted in pertinent part (with an additional clause not here important) by the Act of March 12, 1936 (49 Stat. 1160).

Section 1 of the Act of January 27, 1933 (47 Stat. 777) provided for restricted and tax exempt land acquired by inheritance to remain tax exempt for a stated period and provided:

"That all minerals * * * produced from said land so acquired shall be subject to all * * * Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495)." (emphasis added).

This section of the 1933 Act, however, was repealed by Section 12 of the Act of August 4, 1947 (61 Stat. 731) to eliminate possible confusion. The act of August 11, 1955 (69 Stat. 666) extended the period of restrictions on Choctaw land (and all Civilized Tribe land) which period was scheduled to expire on April 26, 1956, "for the lives of the Indians who own such lands subject to such restrictions on the

date of this Act."

[13] It must also be recognized that outside the confines of "general" tax law, a cash bonus is recognized as being distinct from a royalty. A "royalty" has always been considered to be a share of production, or a share of the product or process therefrom, while a "cash bonus" has been viewed as a consideration paid for the execution of an oil and gas lease. E.g., Federal Land Bank of Wichita, Kan. v. Nicholson, 207 Okl. 512, 251 P.2d 490 (1953); Carroll v. Cowen, 180 Okl. 215, 68 P.2d 733 (1937); cf. Wright v. Brush, 115 F.2d 265 (10th Cir. 1940).

And it must further be recognized that the various regulations adopted by the Commissioner have never considered bonuses to be a part of production or advance royalties, but have considered each separately. In fact, the Commissioner has specifically declared that

"A cash bonus, though termed an advance royalty payment, paid to a lessor without

regard to production and often in a year when there is no production, is not a division of products or proceeds therefrom." GEM. 22730, 1941-1 Cum.Bull. 216 (emphasis added).

See also Shamrock Oil & gas. Corp., 35 T.C. 979, 1056 (1961).

It is clear from a reading of the oil and gas lease at bar [Exhibit E to Stipulation] that the cash bonus was paid to the Superintendent of the Indian Agency and that the lease was given in consideration of the cash bonus and also in consideration of rents for royalties to be paid in the future. Thus the cash bonus was given without regard to production.

Keeping in mind that in Blackbird v. Commissioner, supra, the Tenth Circuit held that general revenue laws are not applicable to restricted Indians unless Congress so directs in clear terms, we feel we must hold that the "cash bonus" cases arising under the general tax code and thus arising in "ordinary tax cases" cannot control the disposition of the case at bar.

Blackbird and United States v. Hallam,

supra, show a clear policy in this circuit to construe Indian laws in a light most favorable to the redman. When Congress spoke regarding the taxability of income derived from restricted Choctaw land, it spoke only in terms of production. The Acts spoke in terms of a "minerals produced" and in terms of a "royalty interest or other mineral production." As we have seen, a cash bonus is not a share of production.

Congress did not specifically state that a cash bonus was to be taxed, nor did it state that a cash bonus would be treated as an "advance" royalty and therefore as a part of production for tax purposes. In this circuit doubtful expressions in Indian tax statutes are to be resolved in favor of the Indian.

It might be argued that Blackbird's wings were clipped by Choteau, supra, and that therefore the policy considerations announced in Blackbird will no longer hold in this circuit.

The easy answer is to state that Choteau was a competent Indian. Further, in Hoffman and Hallam, the Tenth Circuit continued to find tax exemptions by implication when restricted Indians were involved.

If Daney were a competent Choctaw with unrestricted land, the income would, in our opinion, be taxable since the case would then become in the nature of an "ordinary tax case."

[14] But as we read the Supreme Court and Tenth Circuit cases, emphasis is to be given to the "Indian tax rules" over the competing "general tax rules." And in view of the century-old policy of favorable construction of statutes where Indians are involved, Congress has been put on notice that if it intends to "tax the ward for the benefit of the guardian" it must speak clearly. congress did speak - in clear terms of production only. As we read the special acts of Congress passed regarding the Five Civilized Tribes, Congress limited the taxability of income derived from restricted

Indian lands held by noncompetent Indians, to income derived from the production of minerals.

In short, we feel constrained to hold that Congress, in dealing with the Choctaw, must be deemed to have laid down a policy exempting from taxation cash bonuses paid without regard to production in consideration for the execution of oil and gas leases.

Accordingly, we hold that plaintiffs' claim for refund is not barred by the statute of limitations, and hold that the income involved at bar is exempt from taxation. It follows, therefore, that plaintiffs are entitled to recover income taxes in the principle amount of \$18,114.89, plus interest, wrongly assessed and collected for the calendar year 1958.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY DILLON, SR., FAYE DILLON)	
SILAS V. CROSS, MILLIE CROSS,	)	NO. 85-3676,
JAMES M. and ROLEEN L. HARGROVE,	)	85-3677
THEODORE K. & ELIZABETH V. GORD,	)	85-7365
	)	85-7424
Petitioners-Appellants,	)	&84-7863
)	
UNITED STATES OF AMERICA and	)	DC No.CV
COMMISSIONER OF INTERNAL REVENUE	)	83-214-T
	)	TC Nos.11879-
Respondents-Appellees.	)	78, 18177-83
	)	& 2072-82
	)	O R D E R

Before: WRIGHT and ANDERSON, Circuit Judges,
and CROCKER, * Senior District Judge.

The Petition for Rehearing, filed on July
7, 1986, has been considered and denied. **[Filed
July 22nd 1986, U.S. Court of Appeals.]

*Of the Eastern District of California.

** The date of the Petition's denial is taken
from the filing date which is July 22, 1986, as
filed by Cathy A. Catterson, Clerk, U.S. Court of
Appeals.

(2)

No. 86-784

Supreme Court, U.S.
FILED

FEB 20 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

SILAS V. CROSS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE
COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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7PP

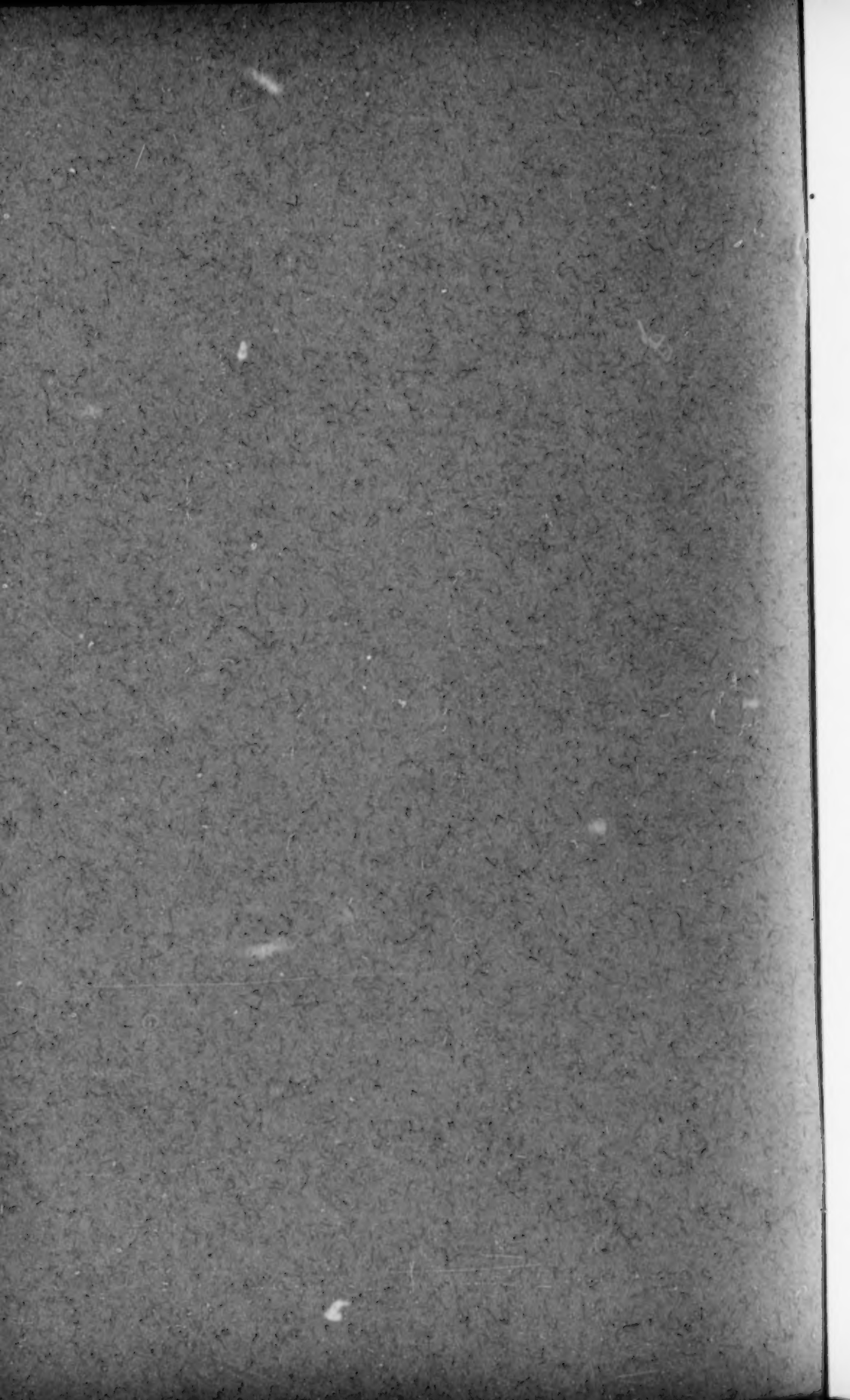


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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-784

SILAS V. CROSS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE
COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

Petitioners contend that the federal income tax does not apply to members of Indian tribes. They also contend, in the alternative, that income earned from the operation of a smokeshop located on the Puyallup Indian Reservation is exempted by treaty or by statute from federal taxation. The court of appeals correctly rejected these contentions. Its decision does not conflict with any decision of this Court or of another court of appeals, and there is no reason for further review.

1. Petitioner Silas V. Cross, a noncompetent,¹ enrolled member of the Puyallup Indian Nation, operated a smoke-shop in the Puyallup Indian Reservation on land first allotted to his grandfather in 1886. In 1976, he had a net profit of \$41,687 from the sale of cigarettes and other tobacco products and merchandise in the smokeshop, but he failed to report the income received from the smoke-

¹ The term "noncompetent" refers to the status of an Indian to whom land, held in trust by the United States for his benefit, has been allotted, but who cannot alienate or encumber that land without the consent of the United States.

shop on his federal income tax return for 1976. His son, petitioner Silas A. Cross, who is also a member of the Puyallup tribe, received \$1,899 in wages for working in the smokeshop during 1976. He did not report those wages on his return for 1976. The Commissioner determined that the profits earned by Silas V. Cross and the wages received by Silas A. Cross were includable in their respective incomes and, accordingly, asserted deficiencies in their taxes. Pet. App. AA52-AA53.²

Petitioners sought redetermination of the deficiencies in the Tax Court, which upheld the Commissioner's determination in a reviewed decision (Pet. App. AA48-AA81). The court rejected petitioners' claim that Indians are not liable for the payment of federal income tax (*id.* at AA53-AA54). With respect to the smokeshop income, the court held that the Medicine Creek Treaty of Dec. 26, 1854, United States—Nisqually Tribe, 10 Stat. 1132 *et seq.*, did not create any exemption from federal income taxation (Pet. App. AA55-AA57). And the court held that the tax exemption for income "directly derived" from allotted reservation land (see *Squire v. Capoeman*, 351 U.S. 1 (1956)) is not applicable to wages and profits derived from a retail business that involves no exploitation of the land (Pet. App. AA57-AA61). Finally, the court rejected petitioners' alternative argument that the smokeshop income should be exempt under *Capoeman* at least to the extent that it equated to an imputed fair rental value for the land (*id.* at AA61-AA66). Five judges dissented on this latter point (*id.* at AA68-AA81).

Petitioners' appeal was consolidated in the Ninth Circuit with three other appeals taken by other members of the Puyallup Indian Nation, all of which involved taxation of smokeshop income. The court of appeals unanimously affirmed in all respects (Pet. App. AA1-AA27).

² Petitioners Millie Cross and Francine Cross are the wives of Silas V. Cross and Silas A. Cross, respectively. They are parties to this case solely by virtue of having filed joint 1976 tax returns with their respective spouses.

2. Petitioners' principal contention (Pet. 6-14) is that Indians, or at least noncompetent restricted Indian allottees, are not subject to the federal tax laws. This contention is wholly without merit. By its terms, the federal income tax applies to "every individual" and to "all income from whatever source derived." Internal Revenue Code §§ 1, 61 (26 U.S.C.). It is well settled that Indians, like other citizens, are subject to payment of federal income taxes unless an exemption from taxation can be found in the express language of a treaty or an Act of Congress. See, e.g., *Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent v. Commissioner*, 295 U.S. 418, 419-420 (1935); *Choteau v. Burnet*, 283 U.S. 691, 693 (1931). As stated in *Capoeman*, 351 U.S. at 6, "Indians are citizens and * * * in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." Petitioners' contention (Pet. 6-9) that Indians are not citizens of the United States is plainly wrong. Citizens of the United States are defined by statute to include "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" (8 U.S.C. 1401(b)).³

3. Petitioners contend (Pet. 11-13) that Article 6 of the Medicine Creek Treaty of 1854 exempts their smokeshop

³ Petitioners' contention (Pet. 9-10) that the decision below conflicts with *United States v. Daney*, 370 F.2d 791 (10th Cir. 1966), is fanciful. The Tenth Circuit did not hold in *Daney* that Indians are not ordinarily subject to the federal tax laws; it simply recognized that certain income of a noncompetent Indian living on allotted land may be exempted from tax by treaty or statute. In *Daney*, the court held that an express statutory exemption for land held by members of the Five Civilized Tribes of Oklahoma applied to a bonus received by a member upon execution of a lease of oil and gas rights. The court of appeals in this case similarly recognized that treaties or statutes may grant Indians a tax exemption not available to other citizens. The court concluded, however, that there was no such exemption applicable to the income at issue here.

income from tax. This contention was correctly rejected by the court of appeals (Pet. App. AA8-AA10). Article 6 incorporates an agreement providing that property allotted under the treaty "shall be exempt from levy, sale or forfeiture" (Pet. App. A29; *id.* at AA8-AA9). This language does not purport to establish a tax exemption, and it is patently insufficient to do so. An intent to exclude Indians from taxation must be "definitely expressed." *Choteau v. Burnet*, 283 U.S. at 696; see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973). The treaty language cited by petitioners does no more than prohibit forced transfers of Indian property until the property comes under the jurisdiction of a state constitution. This restriction on alienation of Indian property (established before there was a federal income tax) cannot reasonably be construed as creating a tax exemption for income derived from retail businesses operated on Indian land. See *Superintendent v. Commissioner*, 295 U.S. at 421 ("Nontaxability and restriction on alienation are distinct things.").

4. Petitioners contend (Pet. 13-15) that the court of appeals erred in construing the tax exemption established in *Squire v. Capoeman* as applying only to income "directly derived" from allotted trust land (see Pet. App. AA14-AA21).⁴ This contention is without merit. In *Capoeman*, the Court held that the government's obligation under the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, to transfer allotted trust properties at the end of the trust period "free of all charge or incumbrance" required that income "derived directly" from such properties be exempted from taxation. See 351 U.S. at 9. Applying that rule, the Court disallowed federal taxation of income from

⁴ Petitioners do not appear to challenge the court of appeals' application of its construction to the particular facts involved here, and they clearly do not renew in this Court their contention below that an amount equal to the fair rental value of the land should be exempted from taxation.

the sale of standing timber on allotted lands, but allowed taxation of "reinvestment income" (*ibid.*). In the wake of *Capoeman*, the lower courts have consistently drawn a distinction between income derived directly from the allotted trust land, which is tax exempt, and income only indirectly related to the land, which is not tax exempt. See, e.g., *Critzer v. United States*, 597 F.2d 708, 712-714 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979) (income from motel, restaurant, and gift shop not exempt); *Hayes Big Eagle v. United States*, 300 F.2d 765, 770 (Ct. Cl. 1962) (royalty income from mineral extraction exempt); *Hale v. United States*, 579 F. Supp. 646 (E.D. Wash. 1984) (rental of improved property not exempt); *Hoptowit v. Commissioner*, 78 T.C. 137 (1982), aff'd on another issue, 709 F.2d 564 (9th Cir. 1983) (smokeshop income not exempt). This distinction is soundly based in the express language of *Capoeman* and is fully consistent with the scope of the General Allotment Act. Hence, the income earned by petitioners in the form of wages and profits from the operation of a retail smokeshop on their allotted land, which clearly was not derived directly from that land, is subject to federal income taxation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1987